

87-1587

No.

Supreme Court, U.S.

FILED

DEC 21 1987

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

DAVID YASHON, M.D.,

Petitioner,

v.

WILLIAM E. HUNT, M.D., et al.,

Respondents.

APPENDIX TO PETITION FOR A WRIT
OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Rudolph Janata
Charles C. Warner
Thomas A. Young*
Porter, Wright,
Morris & Arthur
41 South High Street
Columbus, Ohio 43215
(614) 227-2000

Counsel for Petitioner

*Counsel of Record



No. 85-4027

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DAVID YASHON, M.D.,)	
ET AL.,)	ON APPEAL from
Plaintiffs-)	the United
Appellants.)	States District
)	Court for the
v.)	Southern
)	District of
WILLIAM E. HUNT,)	Ohio.
M.D., ET AL.,)	
Defendants-)	
Appellees.)	

Decided and Filed August 3, 1987

Before: KENNEDY and MILBURN,
Circuit Judges; and CONTIE, Senior
Circuit Judge.

CONTIE, Senior Circuit Judge.
Plaintiff David Yashon, M.D., appeals
from the order of the district court
granting judgment in favor of the
defendants and dismissing his action
brought under 42 U.S.C. §1983 to compel



his reinstatement to the attending medical staff at the Ohio State University Hospitals in Columbus, Ohio. The district court's order reentered a prior order of the court in which it had found that the defendants afforded plaintiff due process when they rejected his application for reappointment to the attending medical staff. On appeal, plaintiff claims that the Medical Staff Administrative Committee (MSAC) violated principles of administrative res judicata when, in rejecting his application, it considered charges which had been the subject of prior disciplinary proceedings. Plaintiff also argues that the administrative hearing held to consider his application did not comport with procedural due process. Plaintiff asserts six specific



procedural due process violations: (1) denial of the right to present witnesses and additional documentary evidence; (2) failure by the MSAC to render a written decision explaining its reasons for rejecting plaintiff's application; (3) lack of written standards governing consideration of plaintiff's application; (4) insufficient written notice of the charges asserted at the hearing; (5) denial of any prehearing discovery; and (6) denial of the assistance of counsel at the hearing. Plaintiff lastly contends that the MSAC's decision violated his substantive due process rights. For the reasons which follow, we affirm the judgment of the district court.



I.

This case, which is now before the court for the third time, has a lengthy factual and procedural history which we review here to facilitate a complete understanding of the present appeal. Plaintiff is a duly-licensed neurological surgeon and tenured professor of neurosurgery at the Ohio State University College of Medicine. Pursuant to University Hospitals bylaws, only University faculty members may be appointed to the attending medical staff of University Hospitals. Staff members are appointed for one-year terms and must file an application for reappointment at the end of each term. Pursuant to this procedure, plaintiff was continuously



on the attending medical staff from September, 1969 through June 30, 1981. Prior to June, 1981, plaintiff submitted his application for reappointment to Dr. Larry Carey, Chairman of the Department of Surgery, but Dr. Carey did not submit the application to the MSAC for consideration. Consequently, Dr. Carey prevented renewal of plaintiff's staff privileges. This was the most recent of several disciplinary actions or investigations initiated against plaintiff.

The first such action involved a detenurization proceeding based on the allegation that plaintiff engaged in "gross misconduct" by using another faculty member's name in a grant application without that faculty member's permission. Dr. Henry



Cramblett, then Dean of the College of Medicine, reversed the charge, observing that plaintiff's conduct was "serious" but did not alone warrant detenurization, especially since plaintiff had subsequently notified the National Institute of Health to withdraw the other faculty member's name from the grant application.

The second action was an attempt to remove plaintiff from the attending medical staff based on charges raised by Dr. Carey in late 1979. An Investigation Committee reviewed the charges and, finding them to be substantial and the cause of obvious disruption, recommended further review. A Grievance Committee subsequently reviewed the charges and issued a report finding no basis for charges of incompetency, no evidence of

disruptiveness caused by plaintiff, and unfair harassment by Dr. Carey. The Grievance Committee recommended that plaintiff be restored to his full medical staff privileges. The Grievance Committee's report was reviewed by Dr. Manuel Tzagournis, then Associate Dean of the College of Medicine. When Dr. Tzagournis asked the Grievance Committee to provide him with information explaining the basis for its conclusions, the Grievance Committee declined to do so. Dr. Tzagournis ultimately concluded that plaintiff's past conduct was disruptive and justified a "strong reprimand" but did not warrant curtailment of medical staff privileges. After plaintiff appealed the reprimand to an Executive Committee, Dr. Tzagournis told him that the Committee could confirm, reject, or



modify his decision to issue a reprimand. Plaintiff eventually abandoned his appeal.

The third prior action was initiated against plaintiff by Dr. Hunt, then Chief of Neurological Surgery Service. A four-physician committee found that plaintiff engaged in improper conduct when he removed a note written by Dr. Hunt from a patient's chart. The committee did not believe, however, that it was in a position to render a decision as to any illegality of plaintiff's conduct.

The fourth prior action was taken by Dr. Carey, who suspended plaintiff's admission and operating room privileges in May of 1980 because of the "Brumfield" incident. It was alleged that plaintiff failed to properly respond to a resident's request that he



come to the hospital to attend to a patient. Plaintiff's privileges were reinstated in July of 1980 pursuant to a decision of the Executive Committee.

Most of the charges involved in these prior disciplinary actions were relied upon by Dr. Carey as grounds for withholding plaintiff's application for reappointment to the medical staff.

On July 15, 1981, plaintiff filed the instant action against Dr. Carey, the individual members of the MSAC, and other University physicians and officials.¹ (Footnotes appear at the end of the text.) Plaintiff sought to compel his reinstatement to the attending medical staff and to enjoin further disciplinary actions against him.

On July 17, 1981, the district court entered a consent order whereby



the parties agreed that plaintiff would retain his medical staff privileges until plaintiff's request for injunctive relief was resolved. That same day, the court conferred with counsel for both parties and the parties ultimately agreed to submit plaintiff's application for reappointment to the MSAC for disposition in the same manner as other applications. The district court suggested that Dr. Carey and plaintiff each make a presentation to the MSAC concerning Dr. Carey's reasons for not recommending plaintiff's reappointment to the medical staff, but the court did not suggest or order that the MSAC conduct a "due process" hearing. The court told the parties that no counsel were to be present at the hearing.

Plaintiff subsequently received two



written notices of the hearing by letters from Dr. Tzagournis and Dr. Michael Whitcomb, chairman of the MSAC. Accompanying Dr. Whitcomb's letter was a copy of the letter Dr. Carey had written Dr. Tzagournis, listing the specific charges against plaintiff. Plaintiff also spoke with Drs. Tzagournis and Whitcomb by telephone prior to the hearing, and they both explained that they had no knowledge of any witnesses who might be called by Dr. Carey.

The MSAC hearing was held on September 1, 1981, with Dr. Whitcomb making the following opening statement:

Our purpose here this morning is to review Dr. Yashon's application or request for reappointment to the medical staff. . . . I would like to point out, this is not a court of law. We have no absolute set guidelines in terms of the proceedings



which we are compelled to follow, but our format will be such that I will ask [Dr. Carey] if he chooses and [Dr. Yashon] if he chooses to make some initial comments . . . and then for [Dr. Carey] to present specific reasons why he chose not to recommend [Dr. Yashon] to the staff and, as we go through the process, to allow [Dr. Yashon] to respond to those point by point.

Dr. Carey then gave his opening statements, explaining that he was going to present witnesses and evidence showing why plaintiff was an "undesirable member of this hospital staff." Dr. Carey also stressed:

I am in no position now, nor have I been in the past, to evaluate Dr. Yashon's competence as a neurosurgeon . . . [b]ut I believe I am in a position and have the responsibility of determining whether or not an individual in the Department of Surgery is competent to practice in this institution. That says little specifically about his competence as a physician.

It says something about his propriety as a member of the staff of a teaching hospital.

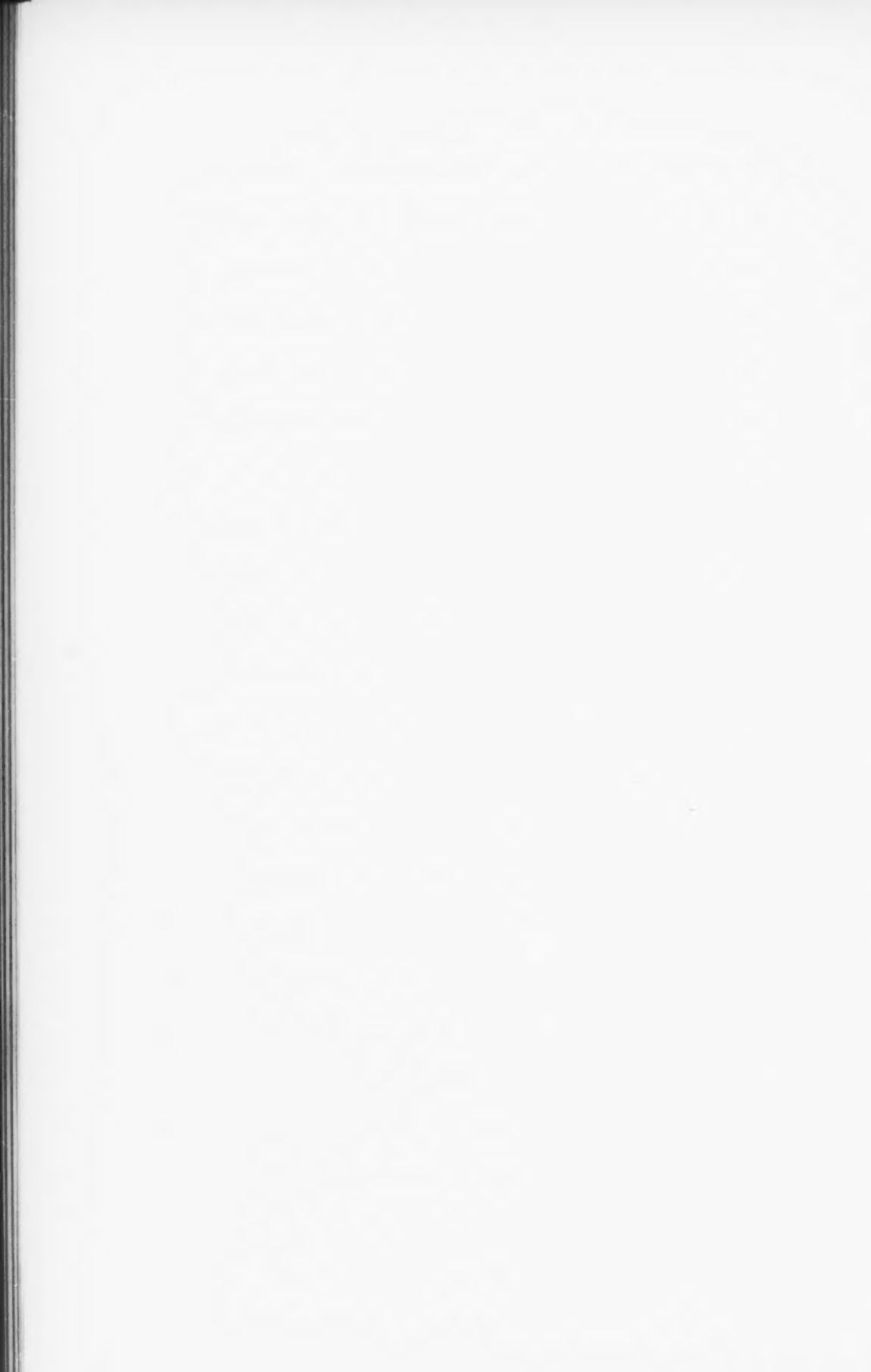
Plaintiff then made his opening statements, asserting that his work had been most satisfactory until Drs. Carey and Hunt began causing him problems in executing his duties. Plaintiff also raised several objections to the hearing's format, including the lack of notice of Dr. Carey's intention to call witnesses. Plaintiff stated:

I have asked Dr. Whitcomb and Dr. Tzagournis . . . [a]re there going to be any witnesses? No witnesses. Now I find out there are going to be witnesses. I don't know what's going on. I will have to face them, but I am not prepared. . . . I object to that.

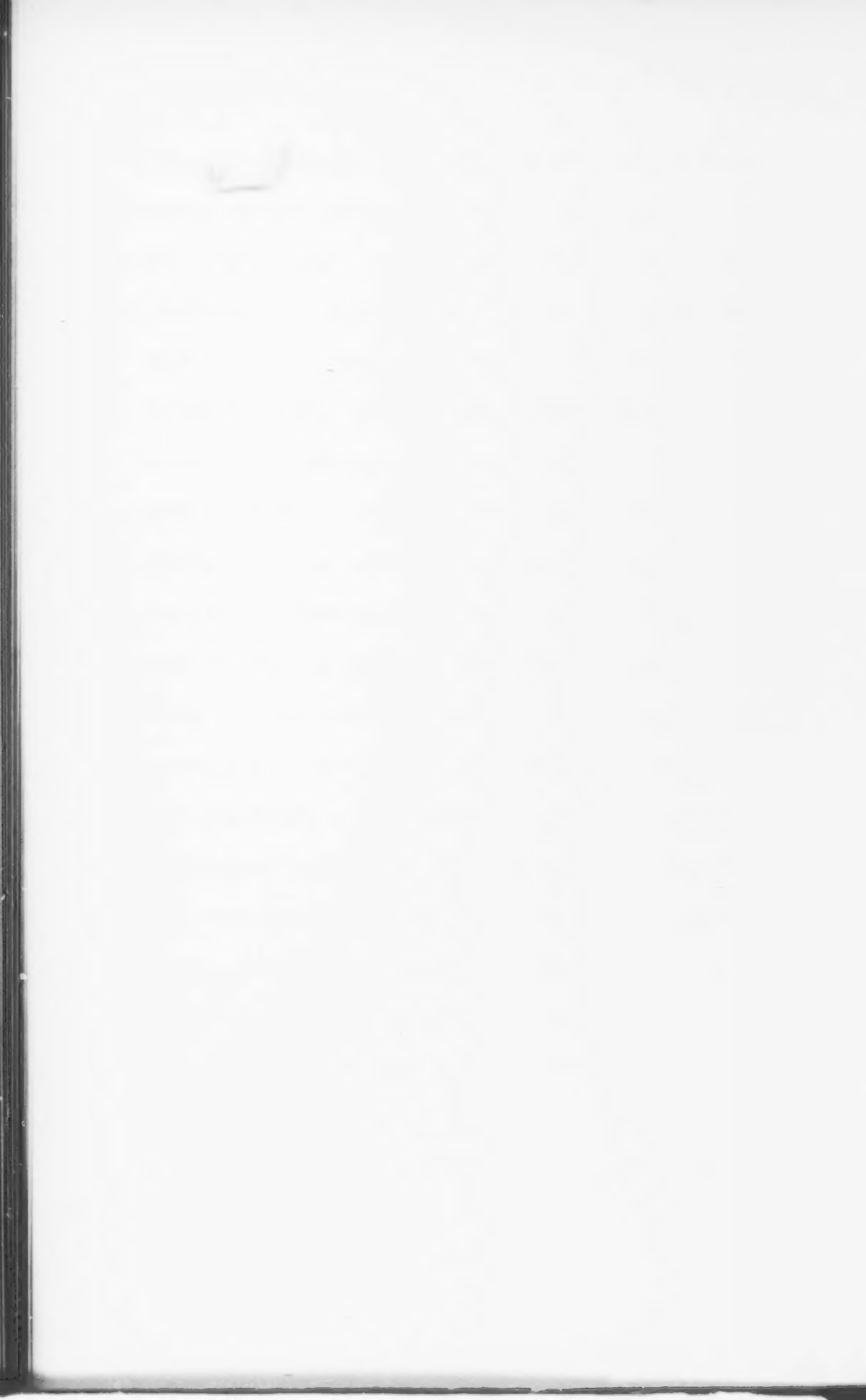
Although plaintiff objected to the presentation of witnesses by Dr. Carey, he did not ask for an opportunity to

present his own witnesses. Plaintiff also objected that most of the grounds being relied upon by Dr. Carey had previously been found meritless by the Grievance Committee, that he had not been given an adequate opportunity to prepare responses to the grounds not previously addressed by the Grievance Committee, and that as a tenured faculty member he could only be removed from the attending medical staff by a detenurization proceeding.

Dr. Carey ultimately presented thirteen witnesses at the hearing. Plaintiff was afforded the opportunity to cross-examine each of them, and members of the MSAC were permitted to ask questions as well. One of the witnesses was Dr. Warren Leimbach, who stated that he received three complaints from residents about



plaintiff's coverage of the residency program. Specifically, one first-year resident told him that she had to perform an operation without plaintiff's presence and that the operation had less than satisfactory results. Plaintiff responded to this testimony by asserting that the resident never performed an operation without him being present. Karen Nedelka, who was the head nurse in the neurosurgical intensive care unit, also testified. She related two specific incidents of plaintiff's failure to properly respond to patient treatment situations, one of which involved the care of a Mrs. Brumfield. Dr. Rees Freeman then testified and discussed the circumstances of the Brumfield case in more detail, explaining how plaintiff failed to properly respond to



the situation after being called several times. Dr. Freeman was a resident at the time. Dr. Freeman also described plaintiff's failure to respond to the other emergency situation described by Nedelka. Dr. Freeman and several other residents testified that they were uncomfortable with plaintiff's performance as a teacher and his practice of neurosurgery. Finally, various witnesses discussed the prior disciplinary actions initiated against plaintiff and the grounds for those actions.

At the close of the hearing, members of the MSAC voted thirteen to four to reject plaintiff's application for reappointment. The MSAC did not, however, render any written decision detailing its findings.



On September 18, 1981, the defendants moved the district court to vacate the consent order providing for plaintiff's continued membership on the attending medical staff pending the MSAC hearing and disposition. The defendants also requested the court to enter summary judgment in their favor, urging that the MSAC hearing afforded plaintiff all the process he was due.

In an extensive opinion filed on February 26, 1982, the district court vacated its prior consent order and granted the defendants' motion for summary judgment, finding no due process violations arising from the MSAC hearing. The court also rejected plaintiff's claim that principles of administrative res judicata attached to the prior disciplinary proceedings instituted against him and precluded



the MSAC from relying on the same charges raised in those prior proceedings.

Plaintiff then pursued his first appeal to this court. On appeal, we declined to reach the merits of plaintiff's procedural due process arguments, holding instead that the district court erred by failing to address the threshold inquiry of whether plaintiff had a protected property or liberty interest in his position on the attending medical staff. Yashon v. Hunt, 696 F.2d 468 (6th Cir. 1983). Noting that the requirements of procedural due process apply only to constitutionally protected interests, this court concluded that a remand was necessary to allow the district court to make a



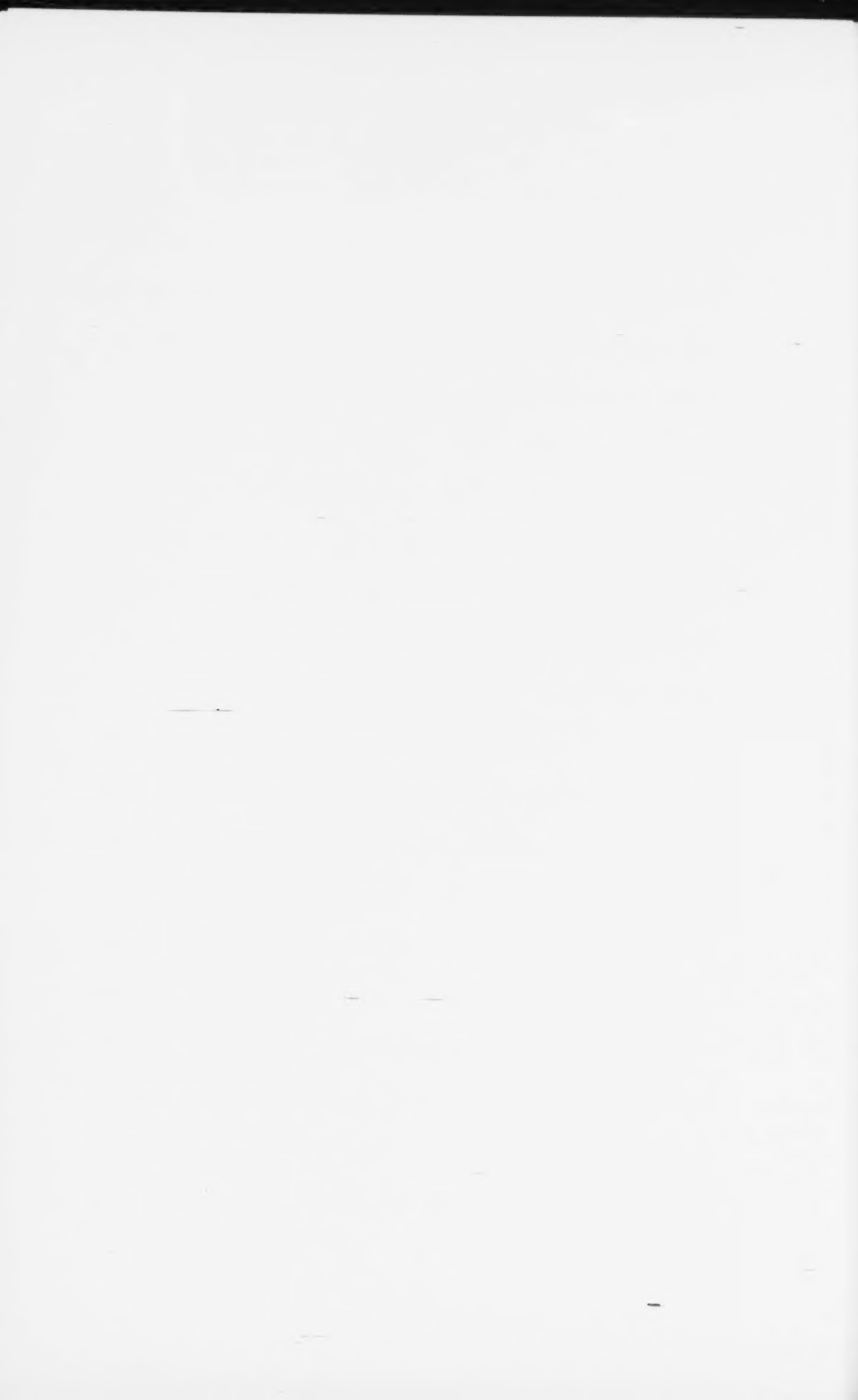
determination on the protected interest question. Id. at 470.

On remand, plaintiff requested discovery because the protected interest issue had not been addressed by either party. The district court denied this request, determining that the issue could be resolved on the basis of the original record. The court ultimately found that plaintiff had no protected property or liberty interest in his position on the attending medical staff, and again granted summary judgment in favor of the defendants.

Plaintiff again brought an appeal to this court and we again vacated the judgment of the district court and remanded for further consideration. Yashon v. Gregory, 737 F.2d 547 (6th Cir. 1984). We stated two grounds for

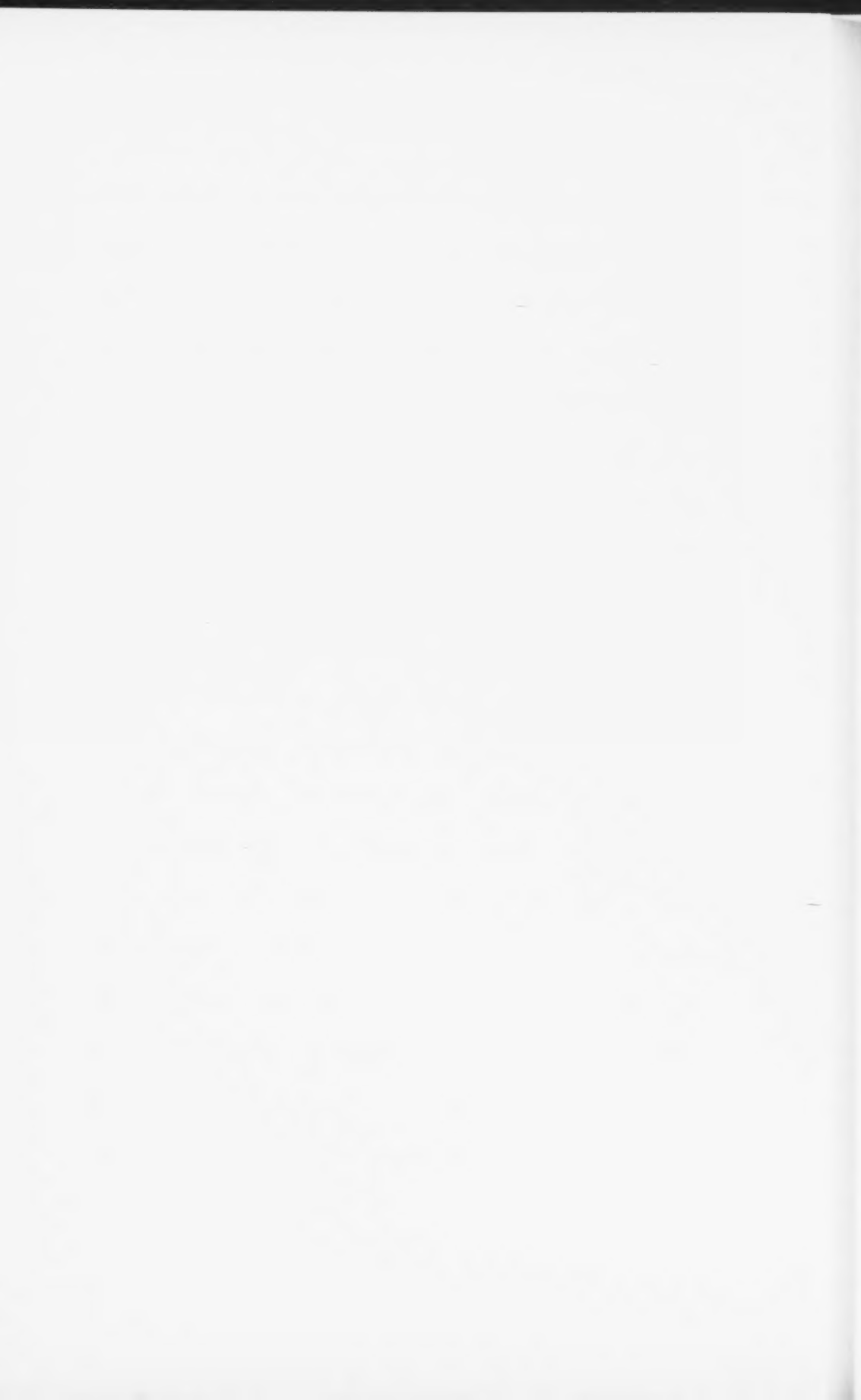
the decision to remand: (1) the district court improperly entered summary judgment sua sponte without giving plaintiff appropriate notice or the opportunity to respond, id. at 552-53; and (2) the district court erred in denying plaintiff's request for discovery because there were disputed issues of material fact which were subject to discovery. Id. at 553-56.

On remand for the second time, the parties stipulated that plaintiff had a constitutionally protected property interest in his membership on the attending medical staff. Accordingly, the district court issued an opinion and order on November 6, 1985, finding that plaintiff had a protected property interest in continued staff privileges. Since plaintiff had such a



protected interest, the court observed that plaintiff was "entitled to a due process hearing in connection with the decision on his annual reappointment to the medical staff."

On November 18, 1985, the district court resolved the due process issues. The court decided, and counsel agreed, that it should reenter its original decision denying plaintiff's claims. In accordance with that prior decision, the court again entered judgment in favor of the defendants, from which plaintiff now appeals. Accordingly, the instant appeal focuses on the district court's 1982 decision upholding the propriety of the MSAC hearing and the MSAC's decision to reject plaintiff's application for reappointment to the attending medical staff.



II.

Plaintiff first argues that principles of administrative res judicata precluded the MSAC from considering charges which had already been raised in prior disciplinary proceedings. As the district court acknowledged in its decision, most of the charges alleged by Dr. Carey in the proceedings before the MSAC had also been asserted in the previous disciplinary actions initiated against plaintiff. The four prior separate proceedings taken against plaintiff resulted in: (1) a "strong reprimand" but no removal from the medical staff; (2) a finding of improper conduct; (3) dismissal of a detenurization complaint; and (4) reinstatement of



operating privileges which had been suspended. Plaintiff contends that principles of res judicata attached to these prior proceedings and therefore barred reconsideration of the charges on which the proceedings were based. Plaintiff primarily relies on United States v. Utah Construction & Mining Co., 384 U.S. 394, 422 (1966), which stated that "[w]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata. . . ." Although Utah Construction and other cases cited by plaintiff addressed the preclusive effect of administrative proceedings on subsequent judicial actions, and the instant case presents the slightly



different question of whether subsequent administrative proceedings are barred by prior administrative proceedings, plaintiff nevertheless urges that the principles are equally applicable here because each of the previous administrative actions fully addressed the merits of the charges and fully exonerated him of those charges.

We are unpersuaded that the MSAC was precluded from considering the charges which had been reviewed in the other disciplinary proceedings. Determinations made in administrative proceedings will generally be given preclusive effect only if the parties had a full and fair opportunity to litigate the matters involved, see Utah Construction, 384 U.S. at 422; City of Pompano Beach v. Federal Aviation Auth., 774 F.2d 1529, 1538-39 n. 10



(11th Cir. 1985), and if the proceedings culminated in a definitive resolution of the matters. Neither of these requirements are satisfied in this case. None of the former proceedings reached a point whereby the parties were given a full opportunity to litigate the charges brought against plaintiff. In each instance, the administrative processes stopped short of the type of formal hearing which was held before the MSAC, and to which principles of res judicata could attach. Furthermore, several of the former proceedings did not definitively resolve the charges asserted against plaintiff in that he was not completely exonerated of improper conduct. Accordingly, we agree with the district court that the previous administrative proceedings should not be given



preclusive res judicata effect and that the MSAC therefore was not barred from considering the charges raised in those proceedings.

III.

Plaintiff asserts that six specific —procedural due process violations arose out of the MSAC hearing. Our review of these due process arguments is governed by several general principles. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)). However, the overall concept of due process of law is a flexible one, and therefore the type of procedural

protections required in a particular situation depends largely upon the circumstances of that situation. Morrissey v. Brewer, 408 U.S. 471, 481 (1972). In determining when a particular procedure is required, three factors should generally be considered:

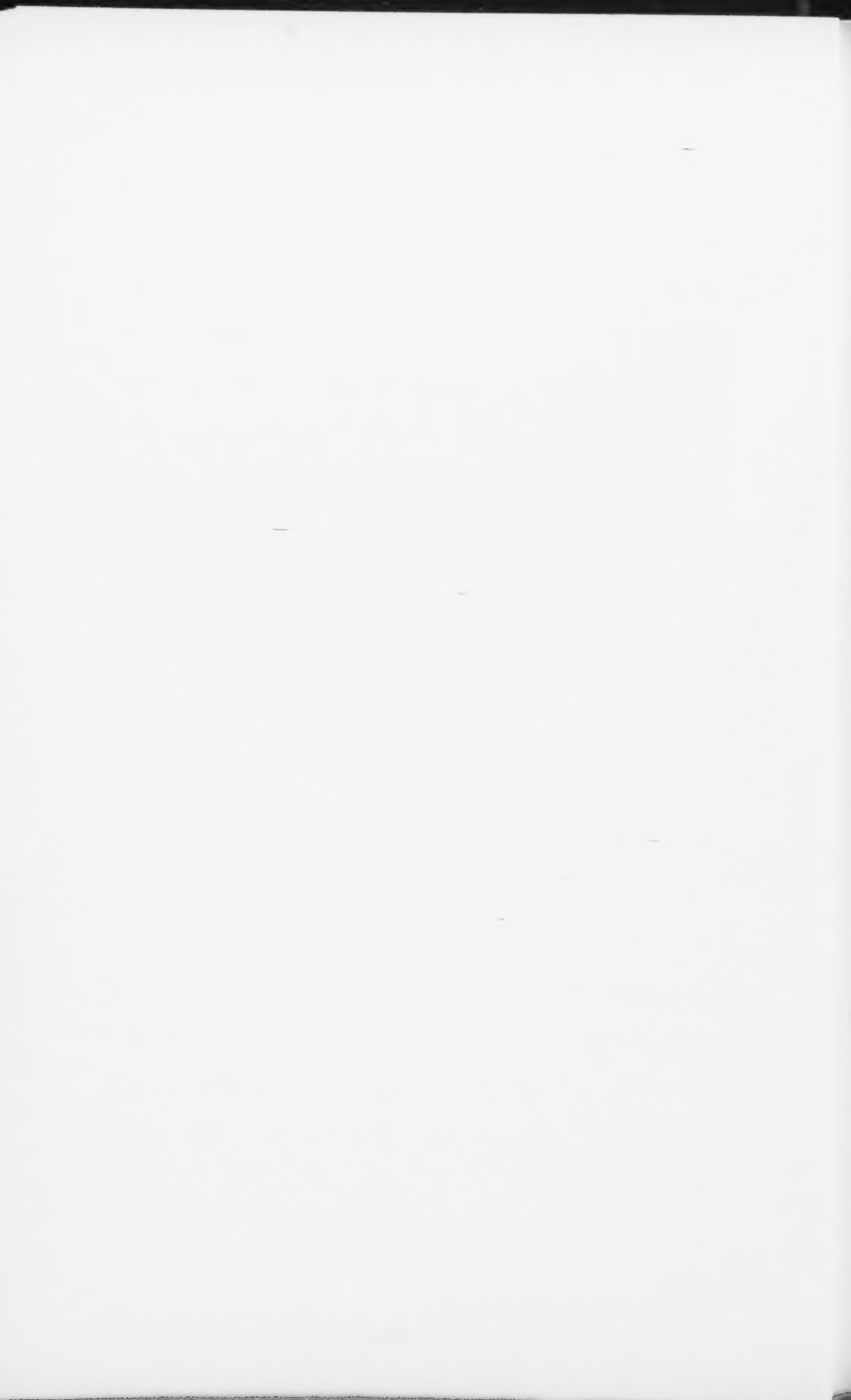
First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335.

It is obvious in the instant case that plaintiff and University Hospitals each had important interests at stake



in the MSAC hearing. Plaintiff had a significant interest in being reappointed to the attending medical staff in order to maintain his professional reputation and his income. On the other hand, it was important to University Hospitals to retain only competent and highly compatible physicians on its medical staff. Hospitals have an important "interest in quickly dealing with incompetence and debilitating personal frictions," in order to ensure "[e]ffective performance by physicians on the staff . . . whose tasks require a high degree of cooperation, concentration, creativity, and the constant exercise of professional judgment." Stretten v. Wadsworth Veterans Hosp., 537 F.2d 361, 368 (9th Cir. 1976).



We must weigh these valid interests of each of the parties in considering the sufficiency of the process afforded plaintiff at the MSAC hearing. In doing so, however, we must also bear in mind that the scope of our review is fairly narrow. A federal court's review of disciplinary actions taken against a physician by a hospital is generally limited to determining whether the procedures used violated any federal rights and whether the administrative body was presented with substantial evidence to support its ultimate action. Lew v. Kona Hosp., 754 F.2d 1420, 1425 (9th Cir. 1985); Woodbury v. McKinnon, 447 F.2d 839, 846 (5th Cir. 1971). It is simply not our function to review the merits of the charges against a physician, Kona Hospital, 754 F.2d at 1425, and we will



generally afford great deference to "the decision of a hospital's governing body concerning the granting of hospital privileges." Laje v. R. E. Thomason Gen. Hosp., 564 F.2d 1159, 1162 (5th Cir. 1977), cert. denied, 437 U.S. 905 (1978). Mindful of these general principles, we turn to the specific procedural due process arguments raised by plaintiff.²

A. Right to Call Witnesses

Plaintiff first argues that the defendants violated his procedural due process rights by denying him the right to present witnesses and additional documentary evidence on his own behalf. Plaintiff contends that there is a well-established constitutional right to call witnesses in proceedings



before an administrative factfinder. For this proposition, plaintiff relies on two Sixth Circuit cases which did not involve the issue of a physician's medical staff privileges, Carter v. Western Reserve Psychiatric Habilitation Center, 767 F.2d 270, 273 (6th Cir. 1985) (discharged civil servant permitted to call witnesses at post-termination Loudermill hearing see Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985)), and NLRB v. Prettyman, 117 F.2d 786, 790 (6th Cir. 1941) (in hearing under National Labor Relations Act, employer may produce evidence and witnesses to refute unfair labor practice charges).

We have found no decisions holding that a physician is constitutionally entitled to call witnesses in a proceeding to determine whether the



physician should be granted staff privileges. Some cases have approved proceedings where no witnesses were called, see, e.g., Woodbury, 447 F.2d at 844, while other cases have approved procedures allowing a physician to call witnesses, see, e.g., Duffield v. Charleston Area Medical Center, Inc., 503 F.2d 512, 519 (4th Cir. 1974). Even in the latter instance, however, it was not held that the ability to call witnesses was constitutionally mandated. Still other cases have simply held that a physician has the right to rebut the evidence against him and cross-examine adverse witnesses. See, e.g., Christhilf v. Annapolis Emergency Hosp. Ass'n., Inc., 496 F.2d 174, 178-79 (4th Cir. 1974).

We conclude that no procedural due process violation occurred when the



MSAC rendered its decision without hearing from any witnesses testifying on plaintiff's behalf. Several factors are influential in reaching this conclusion.

First, plaintiff mischaracterizes the situation when he claims that the defendants refused to allow him the right to call witnesses, since he never requested permission to call his own witnesses. At the outset of the MSAC hearing, plaintiff objected to the presentation of witnesses by Dr. Carey but he did not ask to present his own witnesses nor did he seek a continuance for the purpose of obtaining witnesses. Instead, he agreed to proceed with the hearing and respond to the witnesses called by Dr. Carey. Plaintiff therefore did not claim before the MSAC that he was entitled to

call witnesses on his own behalf. Accordingly, there was no outright refusal by the defendants to allow plaintiff to call his own witnesses. For us to find a procedural due process violation under these circumstances, we would have to hold that plaintiff was constitutionally entitled as a matter of law to be given the opportunity to call his own witnesses. We believe that adoption of such a constitutional requirement is unwarranted, particularly since due process of law is a flexible concept which requires different procedural protections depending on the situation. Morrissey v. Brewer, 408 U.S. at 481.

Second, plaintiff has never shown what additional evidence or testimony he could have presented at the hearing had he been given the opportunity to do



so. The district court below observed that plaintiff had not, either at the hearing or in his filings with the district court, "proffered the name of any witness he would have called." In the absence of any such proffer, we have no basis for concluding that plaintiff was prejudiced by not having any witnesses testify on his behalf.

Third, we are satisfied that the essential requirement of procedural due process was satisfied here; that is, plaintiff was afforded a meaningful opportunity to be heard. Throughout the hearing, plaintiff had the means to rebut the evidence presented against him, as he was permitted to thoroughly cross-examine the witnesses called by Dr. Carey and to make statements on his own behalf in response to the witnesses' testimony.



Finally, with respect to plaintiff's complaint that he was denied the opportunity to present documentary evidence, the record establishes that he in fact submitted documents at the hearing and that he read extensively from those documents during the hearing. Furthermore, plaintiff did not proffer any additional relevant evidence to the district court which he was prevented from presenting at the hearing. Accordingly, plaintiff again has not shown how he was prejudiced.

In sum, we are unpersuaded that the interests of the parties in this case, as analyzed under Mathews v. Eldridge, are such that plaintiff was entitled to the additional procedural due process safeguards of presenting witnesses or additional evidence on his own behalf.



B. Lack of Written Decision

Plaintiff's second procedural due process claim focuses on the lack of any formal, written decision by the MSAC. Plaintiff contends that the MSAC's failure to render a written decision setting forth its findings and reasoning violates due process because it prevents effective review of the decision and the grounds supporting it. Plaintiff refers the court to the due process concerns addressed by the Supreme Court in Wolff v. McDonnell, 418 U.S. 539 (1974). In Wolff, the Court held that in prison disciplinary decisions "there must be a 'written statement by the factfinders as to the evidence relied on and reasons' for the disciplinary action." Id. at 564

(quoting Morrissey v. Brewer, 408 U.S. at 489). Requiring written records of disciplinary proceedings helps to "insure that administrators, faced with possible scrutiny . . . will act fairly." Id. at 565. Without such written records, inmates would be at a disadvantage when attempting to propound their own cause or defend themselves. Id. This Circuit has also observed that the failure to issue a written decision in a prison disciplinary proceeding inhibits effective appellate review of that decision. Franklin v. Aycock, 795 F.2d 1253, 1256 (6th Cir. 1986).

Plaintiff cites to no case authority for the proposition that an informal hospital decision-making body must issue a written decision explaining its findings and rationale



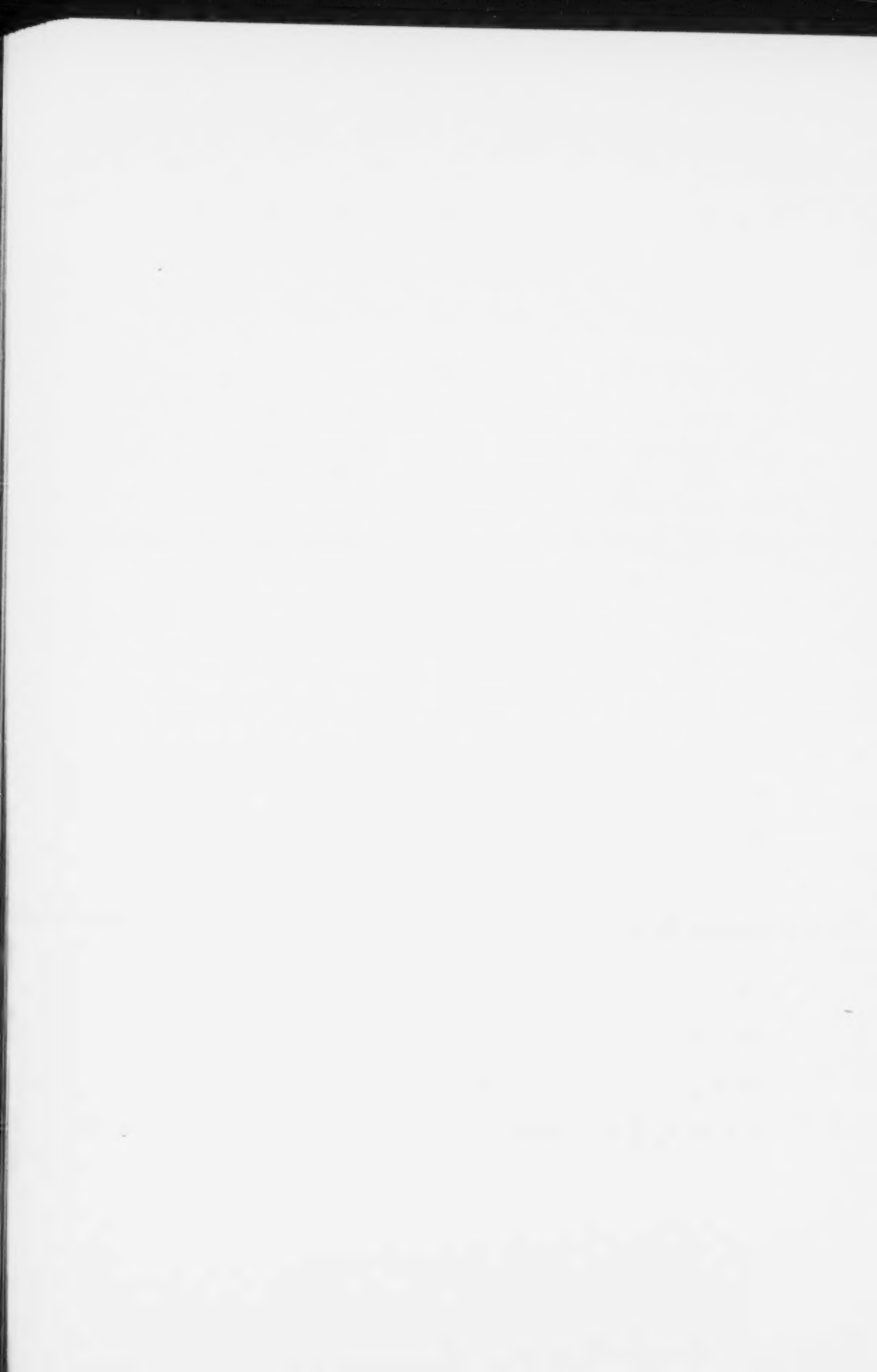
for denying a physician attending staff privileges, and we decline to adopt such a rule under these circumstances. The primary concern of the requirement of a written decision is to provide a sufficient record for a reviewing body to verify that the decision was founded on proper grounds. In the instant case, it was the district court's duty to determine whether the MSAC based its decision "only [on] those matters which are reasonably related to the operation of the hospital." Sosa v. Board of Managers of the Val Verde Memorial Hosp., 437 F.2d 173, 176-77 (5th Cir. 1971). The district court observed that although its inquiry would have been easier had there been a written decision, the absence of a written decision did not preclude effective review because there was a complete



transcript of the MSAC proceedings. The court was therefore able to thoroughly examine the written record and conclude as follows:

[I]n view of the Court's extensive review of the administrative record and its determination that there was sufficient evidence to support many of Dr. Carey's charges, a number of which were not even challenged, the Court cannot find that Dr. Yashon was unfairly prejudiced . . . by . . . the committee's failure to render a written decision as to which charges were meritorious.

Our review of the hearing transcript likewise reveals that the MSAC relied on appropriate considerations in rendering its decision. We accordingly agree with the district court's analysis and hold that the MSAC's failure to issue a written decision did



not violate plaintiff's due process rights.

C. Absence of Governing Standards

Plaintiff next argues that procedural due process required the adoption of express standards governing the denial of an application for reappointment to the medical staff. No such established standards existed when the MSAC rendered its decision. According to plaintiff, this absence of governing standards violated his due process rights because it gave the MSAC unfettered and arbitrary discretion to deny his application for any reason.

We disagree. The pertinent question is whether the evidence relied on by the MSAC was reasonably related to the operation of a hospital and its



attending medical staff. So long as it is based on such proper grounds, the decision to deny a physician's application for reappointment is within the discretion of the MSAC. As we held above, we are satisfied that the MSAC based its decision on appropriate considerations. Accordingly, the lack of established standards does not render the MSAC's decision arbitrary and therefore violative of due process. We are not persuaded otherwise by the cases relied upon by plaintiff since they involve decisions of government agencies and the settled requirement that they be made within established guidelines. See, e.g., White v. Roughton, 530 F.2d 750, 754 (7th Cir. 1976) (administrator of welfare program must establish written

standards governing eligibility for welfare assistance).

D. Adequacy of Written Notice

Plaintiff also argues that he received inadequate notice of the charges which would be brought against him at the hearing. He claims that the notice of charges contained in Dr. Carey's letter to Dr. Tzagournis, a copy of which plaintiff received from Dr. Whitcomb, was not sufficiently specific to enable him to prepare his defense. In support of his argument, plaintiff relies on a district court decision which held that a physician who had his hospital staff privileges terminated was entitled to "a detailed, written statement of the grounds upon which non-renewal of his staff

membership was being considered, specifying the cases in which his professional performance was challenged, and stating in reasonable fullness the nature of the criticism in each case." Suckle v. Madison Gen. Hosp., 362 F.Supp. 1196, 1211 (W.D. Wis. 1973), aff'd on other grounds, 499 F.2d 1364 (7th Cir. 1974).

This argument is without merit. Notice in this type of informal setting need only be specific enough to enable the individual to respond to the charges raised against him; it need not rise to the level of specificity required of a criminal indictment. See, Woodbury, 447 F.2d at 844. The written notice of charges contained in Dr. Carey's letter gave plaintiff sufficient notice under this standard. Furthermore, plaintiff has



acknowledged, and the district court found, that he was already familiar with all but one of the charges asserted by Dr. Carey, since they were the subject - of prior proceedings. Written notice of specific charges is not required where past events or discussion have provided a physician with notice of the charges against him. Ong v. Tovey, 552 F.2d 305, 308 (9th Cir. 1977). Accordingly, we find no procedural due process violation arising from the notice afforded plaintiff.

E. Entitlement to Pre-Hearing Discovery

Plaintiff argues that he was entitled to pre-hearing discovery, which he was denied in violation of his procedural due process rights. While



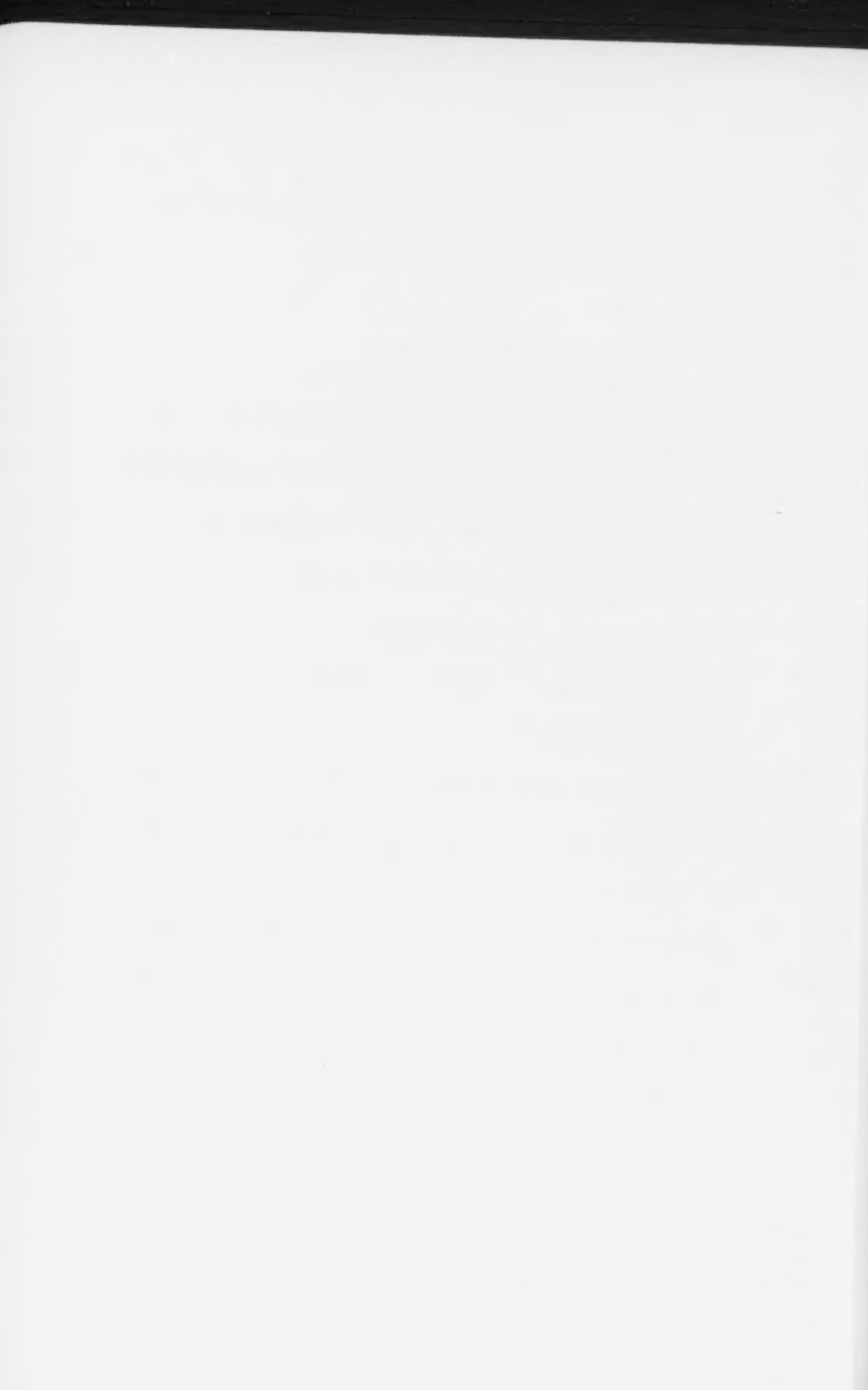
some courts have permitted limited forms of discovery in similar situations, see Christhilf, 496 F.2d at 180 (physician or his counsel given opportunity on remand to "inspect or copy all documents in the hospital's possession bearing on each charge"), there is no constitutional right to pre-hearing discovery under these circumstances. The primary concern is to ensure that plaintiff had an adequate opportunity to prepare or develop his defense to the charges leveled against him. In light of plaintiff's familiarity with the charges, the ongoing nature of the controversy between he and the defendants, and plaintiff's responsiveness to the matters raised at the hearing, we are satisfied that this concern was met. See Klinge v.



Lutheran Charities Ass'n., 523 F.2d 56,
63 (8th Cir. 1975).

F. Assistance of Counsel

The last specific procedural due process argument asserted by plaintiff is that he had the right to be represented by counsel at the MSAC hearing. Although plaintiff acknowledges that there is no constitutional right to the presence of counsel at all administrative hearings, he contends that the absence of counsel in this case increased the "risk of an erroneous deprivation of [his] interest." Mathews v. Eldridge, 424 U.S. at 335. Plaintiff therefore concludes that the assistance of counsel was required to meet notions of fairness. He also again relies on the



statements made by this court in Carter v. Western Reserve Psychiatric Habilitation Center, 767 F.2d 270, 273 (6th Cir. 1985) (in post-termination Loudermill type hearings, discharged civil servants have the right "to have the assistance of counsel"). Plaintiff urges this court to extend the right to counsel to proceedings held to evaluate a physician's application for membership on a hospital's attending medical staff.

This we decline to do. This Circuit has already held that an individual is not entitled to the assistance of counsel in informal university administrative proceedings. See Crook v. Baker, 813 F.2d 88, 99 (6th Cir. 1987); Frumkin v. Kent State Univ., 626 F.2d 19, 21 (6th Cir. 1980). Furthermore, the parties here



had originally agreed in their proceedings before the district court that no counsel would be present at the hearing. Finally, we believe the district court properly concluded that plaintiff was not prejudiced by the absence of counsel. The district court reasoned:

Where, as here, the record shows that Dr. Yashon fully participated at the hearing, that he was conversant with all of the charges made by Dr. Carey, and that he was competent at cross-examination, the Court concludes that it is unlikely that the presence and participation of counsel on Dr. Yashon's behalf would have provided a procedure less likely to have resulted in erroneous findings of fact.

This analysis is persuasive and illustrates that the lack of counsel under these circumstances did not increase the "risk of an erroneous



deprivation of [plaintiff's] interest." Mathews, 424 U.S. at 335. Thus, due process did not require that plaintiff be assisted or represented by counsel at the hearing. Cf. Goldberg v. Kelly, 397 U.S. 254, 270-71 (1970) (welfare recipients entitled to a hearing before termination of their benefits and, if they have counsel, are entitled to have counsel cross-examine witnesses at the hearing).

G. Other Procedural Due Process Concerns

Apart from the specific procedures which plaintiff believes were essential to comply with due process, there are other general aspects of the MSAC hearing which plaintiff contends rendered the hearing fundamentally unfair and therefore violative of due



process. Plaintiff complains that the format of the hearing exceeded the district court's suggestion to the parties that Dr. Carey and the plaintiff each make oral presentations of their cases. In plaintiff's opinion, the MSAC ignored this "directive" of the district court by permitting Dr. Carey to call thirteen witnesses. Plaintiff also raises a form of conflict of interest or unfair bias argument, arguing that Dr. Carey and the members of the MSAC had mutual interests even though they had assumed the separate roles of prosecutor and neutral arbiter, respectively. As an indicia of their mutual interests, plaintiff cites to the fact that the same legal counsel represents Dr. Carey and the MSAC members in this and other actions. Plaintiff believes that the



close relationship between Dr. Carey and the MSAC members tainted the propriety of the MSAC hearing under the general principle that the roles of judge and prosecutor should not be intertwined. See In re Murchison, 349 U.S. 133 (1955).

These arguments, and other related arguments raised by plaintiff, do not convince us that the proceedings were fundamentally unfair. The defendants did not improperly exceed any "directive" of the district court because the court issued no order or mandate; it merely made general format suggestions to the parties which were essentially followed. There was also no improper mixing of the roles of prosecutor and judge. Dr. Carey did not participate either in the deliberations or in the ultimate



decision of the MSAC. Thus, the principles of Murchison were not violated. Cf. Hoberman v. Lock Haven Hosp., 377 F.Supp. 1178, 1186 (M.D. Pa. 1974) (due process violated where physician who filed charges and presented evidence against another physician also participated in the deliberations and decision on the charges). A person is entitled, as a general principle of due process, to have his cause heard before an impartial and neutral tribunal. Marshall v. Jerrico, Inc., 446 U.S. 233, 242 (1980). Since we are satisfied that the defendants took appropriate steps to ensure "the appearance and reality of fairness at the MSAC hearing," id., we conclude that this general principle was not violated. As succinctly stated by the



district court, "on this record, the court cannot conclude that the procedural irrègularities raised by Dr. Yashon rendered the hearing and its accompanying procedural protections fundamentally unfair."

IV.

Plaintiff lastly argues that the MSAC's decision to reject his application for reappointment to the medical staff violated substantive due process. To withstand substantive due process scrutiny, a hospital's decision to deny staff privileges "must be untainted by irrelevant considerations and supported by substantial evidence to free it from arbitrariness, capriciousness, or unreasonableness." Woodbury, 447 F.2d at 842. Although

plaintiff argues that the issue of his disruptiveness or unprofessional behavior was not reasonably related to the operation of University Hospitals, we have already recognized that a physician's unprofessional conduct, incompatibility and lack of cooperation on a hospital staff are appropriate considerations for denying staff privileges. Stretten, 537 F.2d at 368. Because the evidence presented to the MSAC tended to show that plaintiff was disruptive, that he was not compatible with other staff members, and that he had engaged in certain unprofessional improprieties, we are satisfied that there is substantial relevant evidence supporting the MSAC's decision to deny plaintiff's application for reappointment to the medical staff. We therefore hold that



plaintiff's substantive due process rights were not violated.

Accordingly, for the reasons set forth above, the judgment of the district court is AFFIRMED.



FOOTNOTES

- 1 Plaintiff was originally joined in this action by Dr. Thomas Hawk, but Dr. Hawk is not a party to the present appeal.
- 2 Of course, the requirements of procedural due process apply only where protected property or liberty interests are deprived. Board of Regents v. Roth, 408 U.S. 564, 569 (1972). Pursuant to the parties' stipulation, the district court below entered an order finding that plaintiff had a protected property interest in his membership on the attending medical staff. The defendants have not appealed that finding. Accordingly, it is not disputed that the requirements of procedural due process apply with respect to the MSAC hearing.



IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

DAVID YASHON, M.D., et al,

Plaintiffs

vs.

C-2-81-867

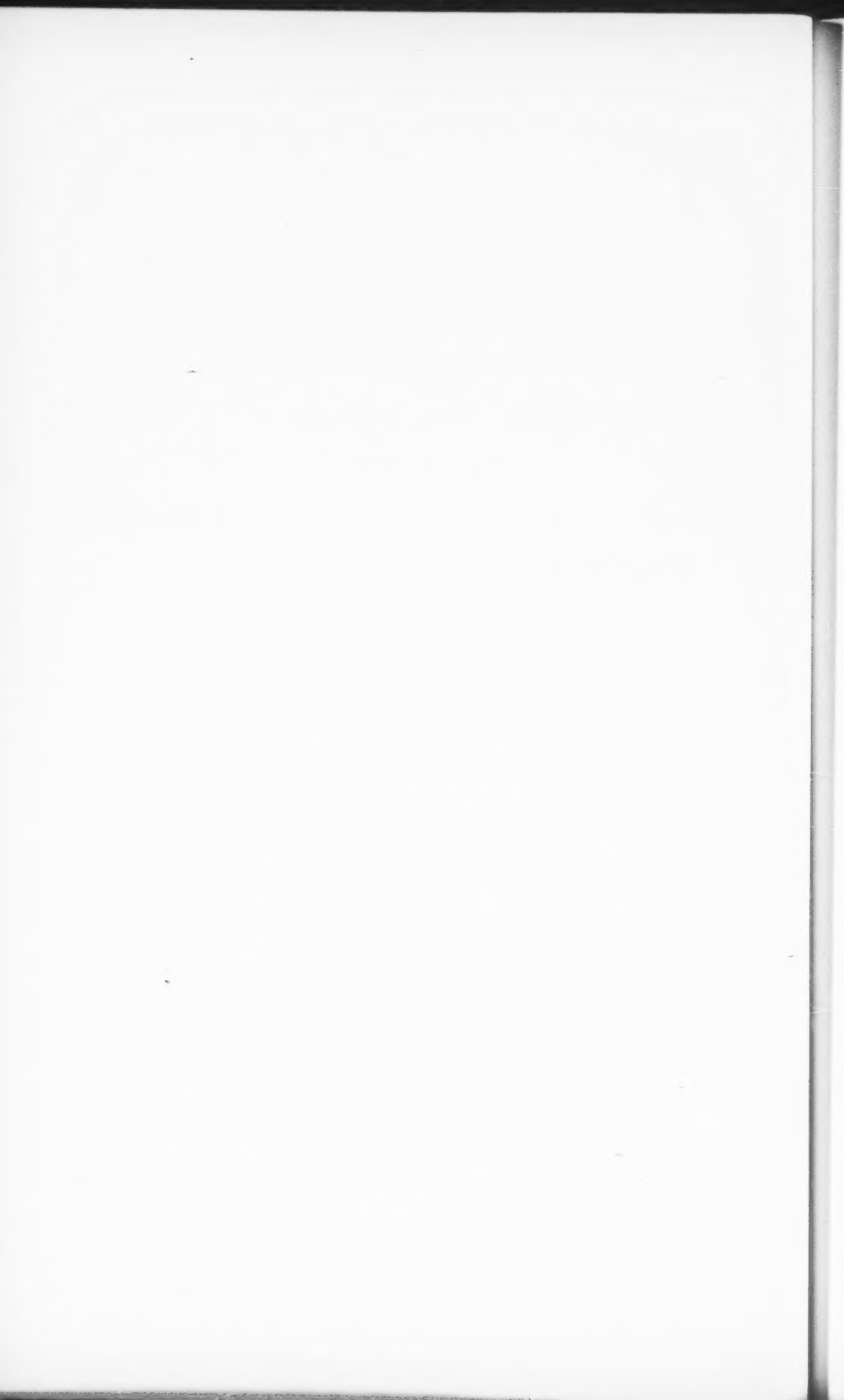
WILLIAM E. HUNT, M.D., et al,

Defendants

OPINION AND ORDER

(Filed February 26, 1982)

This action, which was instituted by David Yashon, M.D. and Thomas Hawk, M.D., seeks declaratory and injunctive relief to compel defendants to reinstate both plaintiffs to the attending medical staff at The Ohio State University Hospitals. On the same day the verified complaint in this



action was filed, plaintiffs filed a motion for a temporary restraining order to require the defendants to reinstate both plaintiffs immediately to the attending medical staff. On July 17, 1981, a consent order was filed, pursuant to which the Court

ordered that, in order to preserve the status quo until the Court renders a decision upon the plaintiffs' request for a preliminary injunction, or until said request is otherwise resolved, Dr. David Yashon and Dr. Thomas Hawk are granted the same rights and privileges which they each had at The Ohio State University Hospitals as of June 30, 1981.

On September 1, 1981, the Medical Staff Administrative Committee of University Hospitals conducted a hearing with respect to Dr. Yashon's application for reappointment to the attending medical staff; at the

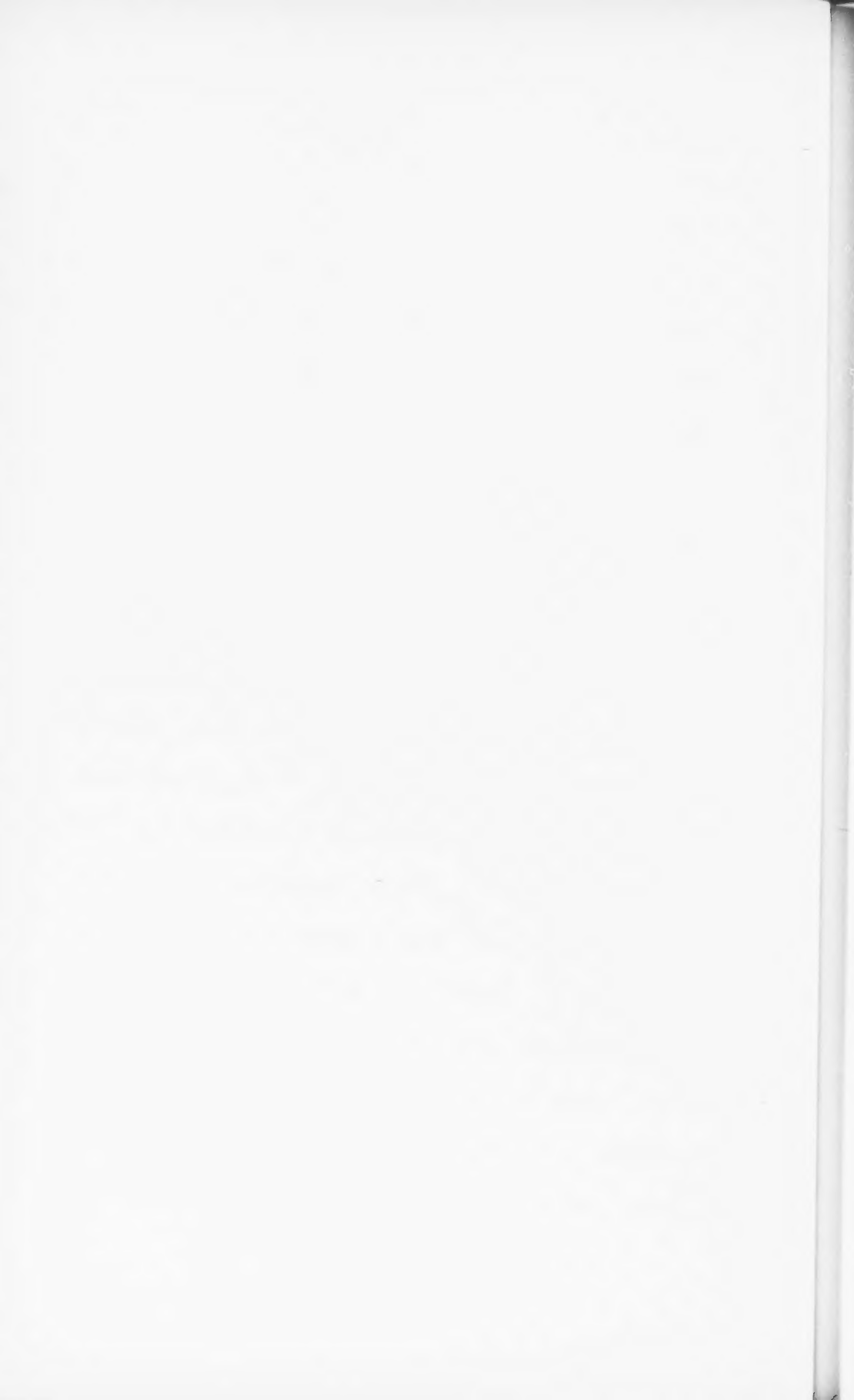


conclusion of the hearing, the committee voted to reject Dr. Yashon's application for reappointment. The defendants, contending that the September 1, 1981 hearing afforded Dr. Yashon all the due process to which he was entitled, have now filed a motion to vacate the consent order and for summary judgment.

This matter is now before the Court on the defendants' motion to vacate the consent order insofar as it ordered that Dr. Yashon be granted the same rights and privileges which he held as a member of the attending medical staff at University Hospitals as of June 30, 1981. Also before the Court is defendants' motion for summary judgment with respect to the claims of Dr. Yashon.

A.

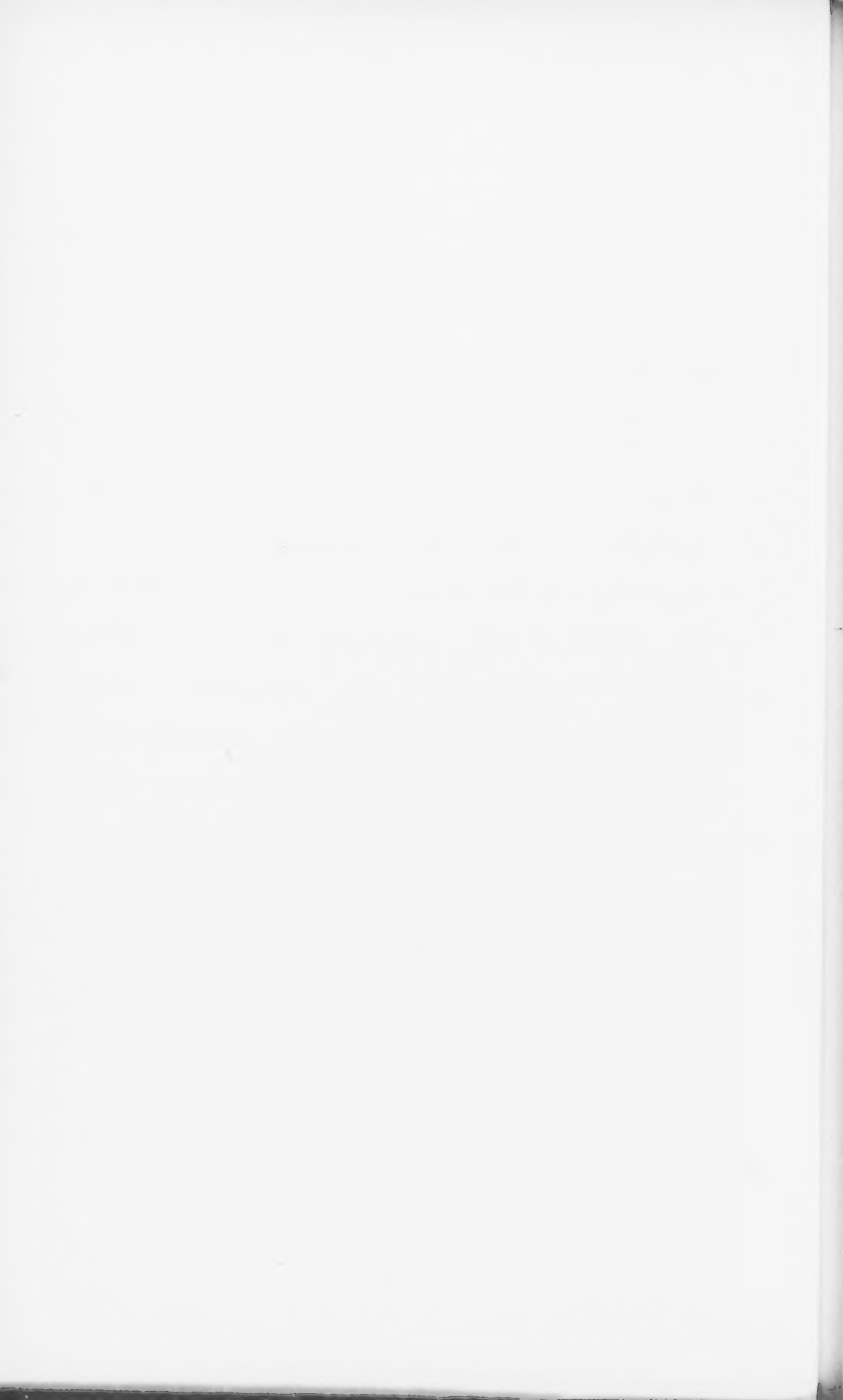
The legal questions that require the Court's immediate attention can only be understood by presenting the background to the present controversy between the plaintiff, Dr. David Yashon, and the defendants. Apart from this action, there are two other civil actions now pending before the Court in which Dr. Yashon alleges that his two immediate superiors at The Ohio State University have repeatedly violated his constitutional rights. Accordingly, as a prelude to a discussion and resolution of the immediate issue of whether the defendants have unconstitutionally failed to reappoint Dr. Yashon to the attending medical staff at The Ohio State University Hospitals, the Court will review the



allegations and claims for relief posited by Dr. Yashon in the three actions now pending before the Court.

1. Yashon I

On January 31, 1978, Dr. Yashon filed a civil rights action; David Yashon v. William E. Hunt, C-2-78-66 [hereinafter Yashon I]. The defendant, Dr. Hunt, was employed by The Ohio State University as professor and Director of the Division of Neurologic Surgery within the Department of Surgery, and as Director of the Training Program in Neurologic Surgery and as Chief of the Neurological Surgery Service at The Ohio State University Hospitals [hereinafter University Hospitals].



Dr. Yashon alleged in the complaint that he had entered into a contract with The Ohio State University, effective July 1, 1974, pursuant to which he was appointed as a Professor in the Department of Surgery.¹ (Footnotes appear at the end of the text.) Dr. Yashon further alleged that he was a member of the attending medical staff at University Hospitals and that his membership was governed by the constitution, bylaws, rules and regulations of the medical staff of University Hospitals. (Complaint, ¶¶4, 8.)

With reference to the defendant, Dr. Yashon alleged that he had "been subjected by Defendant to a deliberate and continuing program of harassment, interference and non-cooperation in his performance of the said Contracts and



Attending Staff Membership"

Complaint, ¶12. This harassment, allegedly undertaken by the defendant through his positions with the university, included, inter alia, the following forms: the defendant interfered with the performance by Dr. Yashon of his duties toward his patients; the defendant interfered with Dr. Yashon's efforts to conduct research; the defendant interfered with Dr. Yashon's teaching responsibilities by giving him a twenty-five percent teaching load in 1976 and no teaching assignments in 1977; the defendant has interfered with Dr. Yashon's publication of research articles; the defendant assigned Dr. Yashon unnecessary research projects and studies; the defendant blackballed Dr. Yashon's nomination for membership in a



national society of neurological surgeons; the defendant verbally berated Dr. Yashon by means of inaccurate accusations of misfeasance or malfeasance in the presence of third parties; the defendant assaulted Dr. Yashon; and the defendant has made numerous inaccurate oral and written criticisms of Dr. Yashon's performance under his contracts with the university to Dr. Yashon himself, as well as to Dr. Yashon's colleagues and superiors. (Complaint, ¶13(a) - (d), (g) - (j).)

Based on these allegations, Dr. Yashon stated six claims for relief that, he prayed, justified an award of \$800,000 in compensatory damages and \$500,000 in punitive damages.² These claims were:



FIRST: That defendant's tortious harassment of Dr. Yashon has rendered it more difficult for Dr. Yashon to perform under his contracts with the university, and that defendant intends by such harassment to prevent Dr. Yashon entirely from performing his duties under said contracts;

SECOND: That, since July, 1975, defendant has tortiously engaged in a pattern of extreme and outrageous conduct;

THIRD: That the defendant, through his on-going acts of harassment, has jeopardized Dr. Yashon's professional and



career prospects, impaired his liberty to practice his profession, impaired his rights to make, enforce, and perform contracts, including his contracts with the university, and violated his rights to procedural due process;

FOURTH: That the defendant, in an interoffice communication of April 21, 1977, knowingly and maliciously made false and defamatory statements about Dr. Yashon;

FIFTH: That the defendant, at a April 21, 1977 faculty meeting, knowingly and

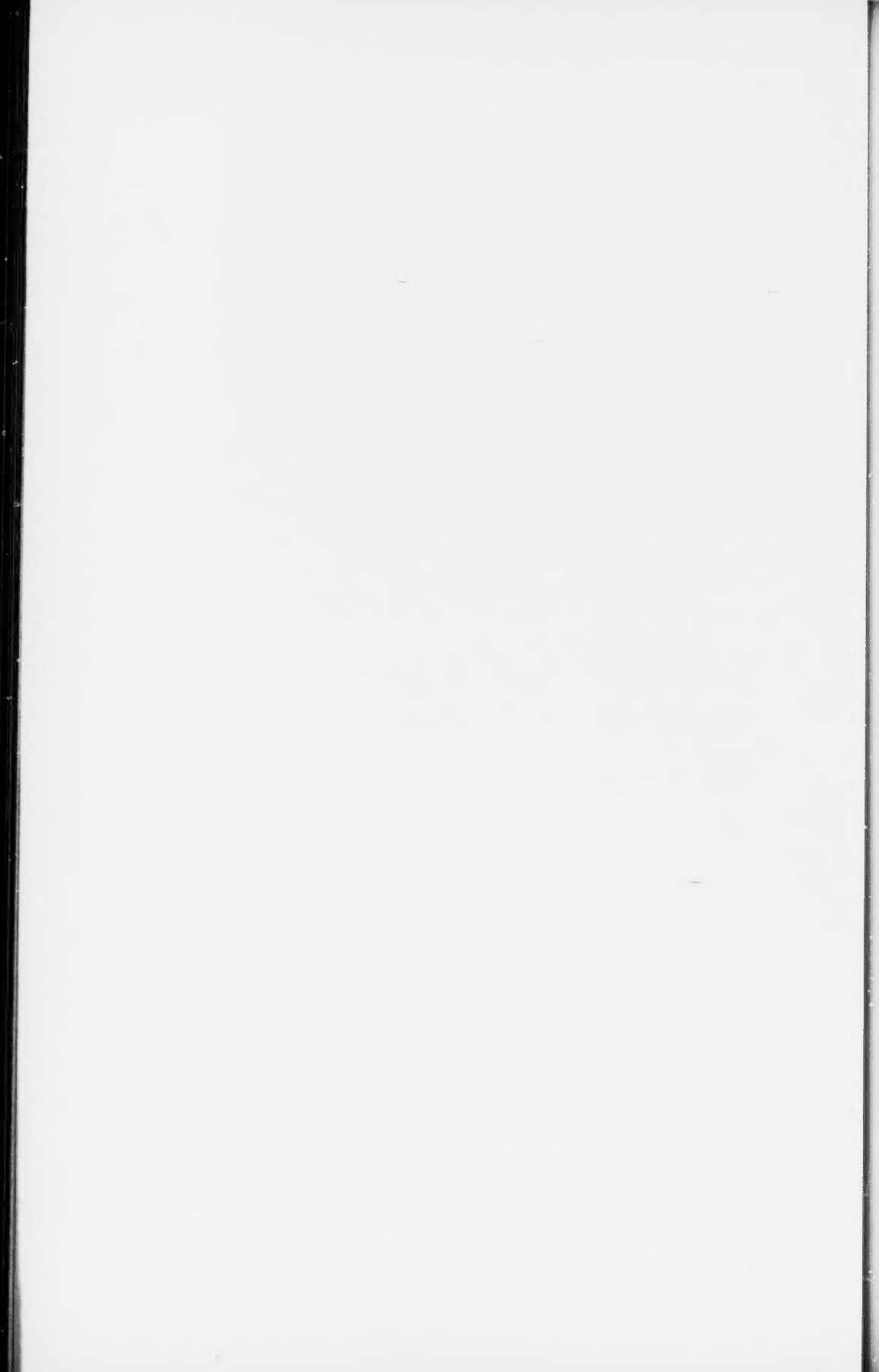


maliciously made false
statements about Dr. Yashon;
and

SIXTH: That the defendant, in
a March 21, 1977 letter to the
Chairman of the Department of
Surgery, knowingly and
maliciously made false
statements about Dr. Yashon.

The above claims allegedly resulted in
injury to Dr. Yashon's professional
reputation, in lost professional fees,
and in mental distress, anguish,
embarrassment, and humiliation.

The defendant, Dr. Hunt, filed an
answer on April 3, 1978 in which he
denied all of the substantive
allegations of wrongdoing.



Approximately one year later, on February 9, 1979, Dr. Yashon filed a motion for a preliminary injunction in which he asked that the Court compel Dr. Hunt (1) to reinstate him as a teacher of residents in the Division of Neurologic Surgery in the same manner and to the same degree as other tenured professors in the division and (2) to restore to Dr. Yashon the assistance of residents for all purposes of teaching and patient care in the same manner and to the same degree as other tenured professors in the division. The basis for Dr. Yashon's motion was Dr. Hunt's allegedly unconstitutional conduct in unilaterally notifying Dr. Yashon, in a letter dated December 21, 1978, of his decision to eliminate Dr. Yashon's teaching responsibilities and the



assistance provided Dr. Yashon by residents.

The Court noticed the parties that an evidentiary hearing on Dr. Yashon's motion would be held on February 27, 1979. In lieu of the hearing, the following order was entered on February 27:

By agreement of the parties, and with the approval of the Court, it is hereby ORDERED that the assignment of this cause for an evidentiary hearing on plaintiff's motion for a preliminary injunction on February 27, 1979, is vacated pending the further order of the Court; that the parties will pursue alternative means of resolving the matters raised by said motion and will report back to the Court whether such means have been successful or unsuccessful; that, until further order of the Court or pursuant to the Stipulation of the parties entered into this date, the operation and effect of defendant William E. Hunt's letter of December 21, 1978, to plaintiff David Yashon



shall be stayed and plaintiff restored to the resident teaching program in neurological surgery; and that the pursuit of such means of resolution shall not be considered a waiver by either party of any claims, defenses, rights or privileges which he may have, except as and to the extent the parties may further agree in writing.

The stipulation referred to in the above order had provided:

1. The defendant will take immediate steps to attempt to arrange for a hearing through the Residency Review Committee for Neurological Surgery.

2. If arrangements for such a hearing cannot be made through said Residency Review Committee, or if the parties cannot agree to the hearing procedure, then in that event the parties will attempt to arrange an alternate hearing pursuant to agreement.

3. The subject matter of such hearing before the Residency Review Committee for Neurological Surgery, or such other hearing procedure to which the parties may

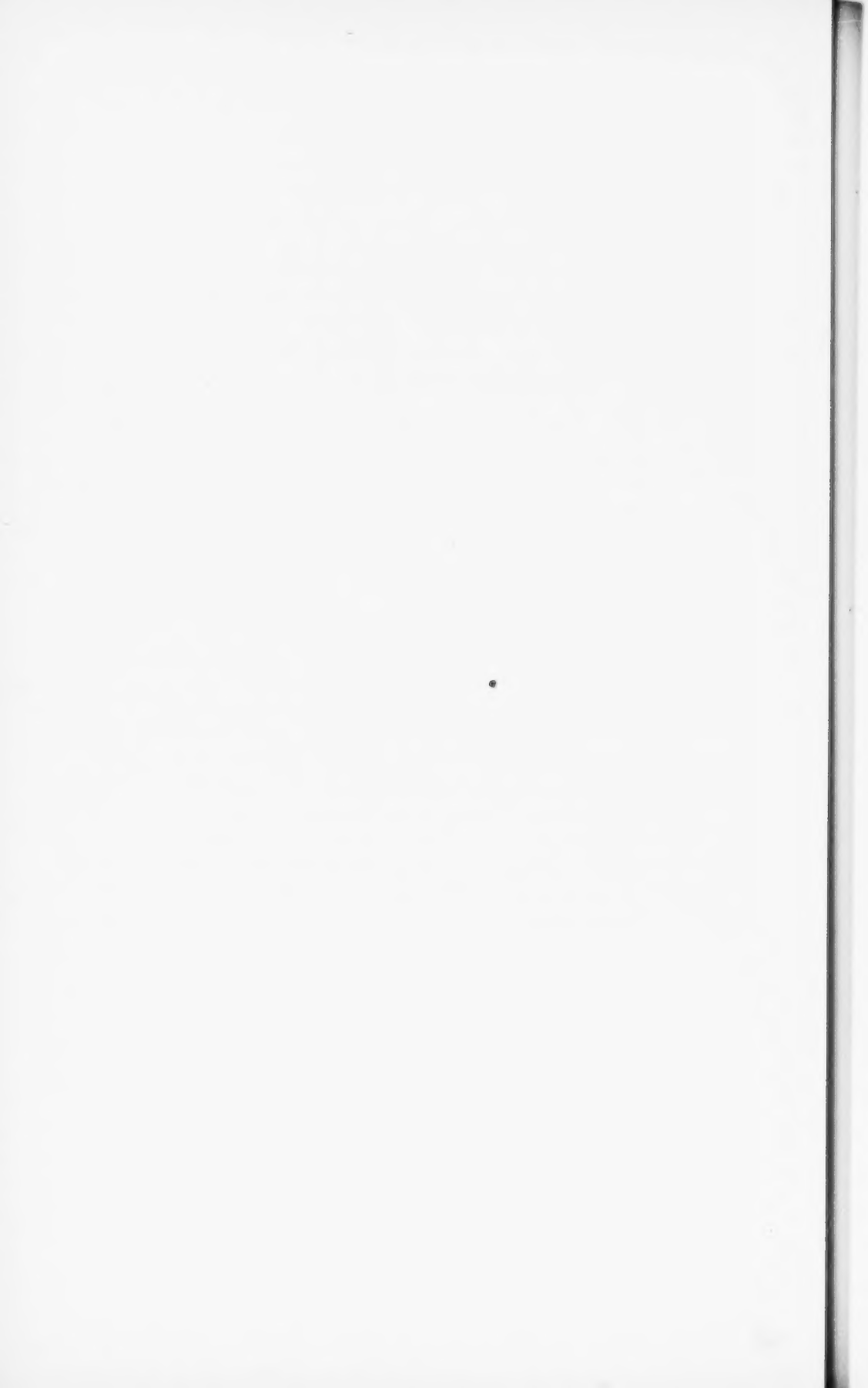


agree, will be whether the action of the defendant of withdrawing the plaintiff from participation in the residency training program was or is justified by the facts relevant thereto. The review of this issue will be on a de novo basis.

4. The procedural and other matters in respect to such hearing will be pursuant to the agreement of the parties.

5. Effective immediately the directive of the defendant, as set forth in his letter of December 21, 1978 to the plaintiff terminating the assignment of the plaintiff to the residency program in neurological surgery will be stayed and held in abeyance pending the holding of a hearing as set forth above, and the determination or decision pursuant to such hearing.

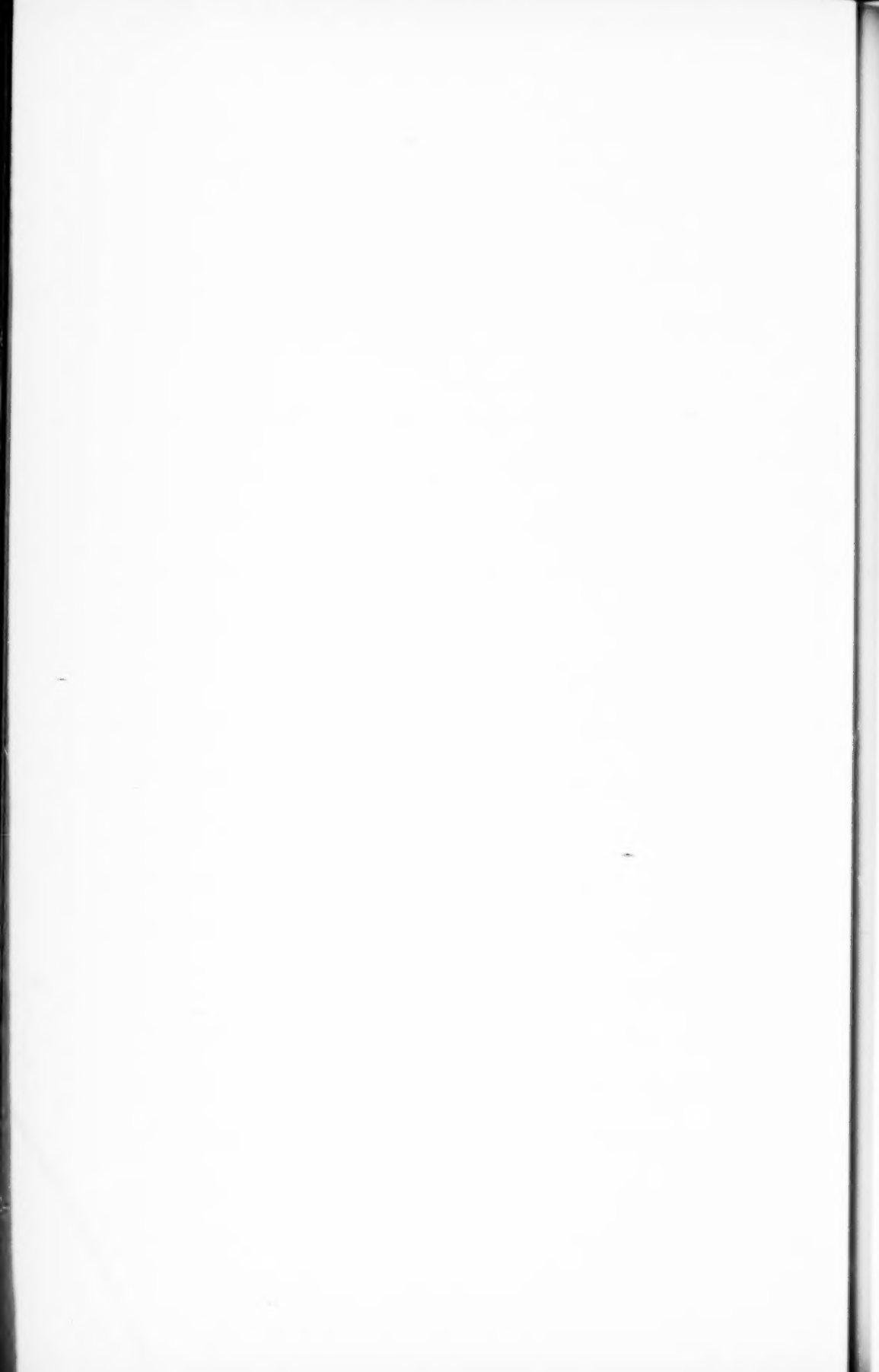
6. In the event that a hearing cannot be arranged through said Residency Review Committee, and the parties cannot otherwise agree with respect to arranging a hearing as provided in paragraphs 1 and 2 above, then the plaintiff will request this Court to assign



the plaintiff's Motion for Preliminary Injunction for an evidentiary hearing.

Appended as Exhibit B to Dr. Yashon's Second Motion for Preliminary Injunction.

On May 7, 1979, Dr. Yashon filed a second motion for a preliminary injunction asking the Court to enjoin a hearing scheduled by Dr. Hunt for May 14, 1979 and to continue in effect the Court's order of February 27, 1979. Dr. Yashon maintained that the planned hearing did not comply with the February 27 stipulation in that the parties had not agreed upon the panel membership or the procedures to be used by the panel and in that the hearing was not to be held before a residency review committee. Dr. Yashon further contended that the proposed date did



not provide him ample time for discovery, that the proposed hearing procedures did not comport with the minimum standards of due process, and that, were the hearing held as scheduled, there was a substantial danger that he would again be wrongly denied of his rights and privileges as a tenured professor.

On May 21, 1979, the Court entered another order in this case:

By agreement of the parties, and with the approval of the Court, it is hereby ORDERED that this cause will not be assigned for a hearing on plaintiff's motion for preliminary injunction until further order of the Court; that the Court's order of February 27, 1979, is vacated insofar as it stayed the operation and effect of defendant William E. Hunt's letter of December 21, 1978 and restored plaintiff David Yashon to the Resident Training Program in Neurologic Surgery; that, until further order of the



Court or pursuant to the parties' Agreement of May 10, 1979, plaintiff will not be a member of the faculty of the Resident Training Program in Neurologic Surgery; and that the agreement reflected herein, the Agreement of May 10, 1979, and the parties' pursuit of further alternative means of resolution of the issues raised by plaintiff's motion for preliminary injunction shall not be considered a waiver by either party of any claims, defenses, rights or privileges which he may have, except as and to the extent the parties may later agree in writing.

The agreement referred to in the order³ provided:

In order to facilitate Dr. David Yashon in his efforts to seek relocation outside The Ohio State University, the following arrangements are agreed to by David Yashon, William E. Hunt, and their respective counsel:

1. Dr. Yashon agrees that the decision of Dr. Hunt on December 21, 1978, to remove Dr. Yashon from the faculty of the Residency Training



Program of Neurologic Surgery shall be reinstituted to take effect May 14, 1979, and remain in effect until such time as Dr. Yashon is reinstated to the faculty of the Residency Training Program by a decision of a hearing panel, further order of the Court or the further agreement of the parties.

2. The hearing set for May 14, 1979, to review Dr. Hunt's decision of December 21, 1978 is cancelled. The parties will jointly notify Attorney William Alexander of this cancellation.

3. Beginning immediately and continuing through September 4, 1979, plaintiff will actively seek to locate and obtain a position comparable to that which he now holds in an institution outside of The Ohio State University which is acceptable to him. Defendant agrees to support this endeavor by not interfering with and not taking any action which would adversely impact upon this endeavor. Further, it is understood that this endeavor cannot be successful without the active assistance, cooperation and support of the administration of The Ohio State University



Hospitals and The Ohio State
University College of
Medicine.

4. Dr. Yashon may not request restoration to the faculty of the Residency Training Program in Neurologic Surgery until after September 4, 1979. After September 4, 1979, if Dr. Yashon has not relocated outside The Ohio State University and remains a staff member of University Hospital and a faculty member of The Ohio State University, he may thereafter request a hearing to determine whether he should be restored to the faculty of the Residency Training Program. If such a request for a hearing is made by Dr. Yashon, it is contemplated that the hearing will be held before at least three (3) members of the Residency Review Committee for Neurologic Surgery. The Committee itself shall select the three (3) of its own members who will comprise the hearing panel. Dr. Yashon shall not be a member of the faculty of the Residency Training Program in Neurologic Surgery unless and until restored to such position by decision of the foregoing panel, order of the Court or further agreement of



the parties. The procedure for such hearing shall be established by agreement of the parties. The subject matter of the hearing before such panel will be whether the action of defendant in withdrawing the plaintiff from participation in the Residency Training Program was or is justified by the facts relevant thereto, such determination to be made on a de novo basis.

5. It is further agreed that beginning May 14, 1979, provisions will be made for plaintiff's continuation and performance of his responsibilities and duties as a professor and attending physician pursuant to Dr. Hunt's amended memorandum of January 18, 1979. A copy of that amended memorandum is attached hereto as Exhibit "A".⁴

There is no indication in the record of any of the Yashon cases that Dr. Yashon has, to date, requested his restoration to the faculty of the Residency Training Program in Neurologic Surgery



pursuant to paragraph 4 of the May 10, 1979 agreement.

Apart from the matters raised by the two motions for preliminary injunctive relief, the underlying complaint, with the claims against Dr. Hunt for compensatory and punitive damages, is still pending before the Court.

2. Yashon II

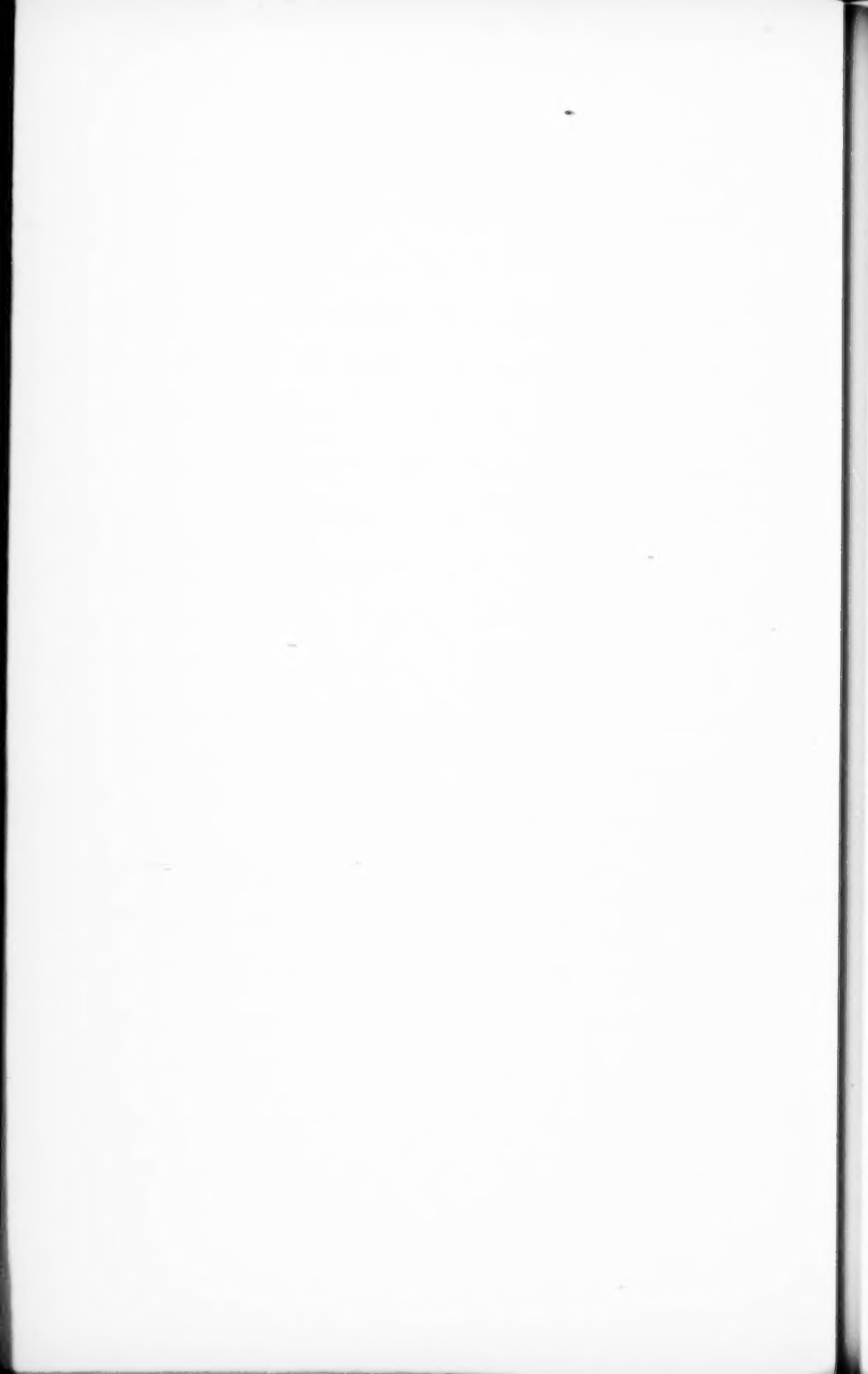
On March 4, 1981, Dr. Yashon filed a second civil rights action, David Yashon v. Larry C. Carey, C-2-81-411 [hereinafter Yashon II]. The defendant, Dr. Carey, was employed by The Ohio State University as professor and chairman of the Department of Surgery, and as the Director of the Training Program in General Surgery and



Chief of the Clinical Division of Surgery in University Hospitals.

The initial allegations in the Yashon II complaint clearly paralleled those in Yashon I. That is Dr. Yashon alleged that he was a tenured faculty member, alleged the terms of his contract with the university, and alleged that his membership on the attending medical staff at University Hospitals was governed by the constitution, bylaws, rules and regulations of the medical staff. (Complaint, ¶¶4, 6 - 8.)

Again, consistent with the allegations in Yashon I, Dr. Yashon alleged that he had "been subjected by defendant [Carey] to a deliberate and continuing program of harassment, interference and non-cooperation in his performance of the said contracts and



attending staff membership"

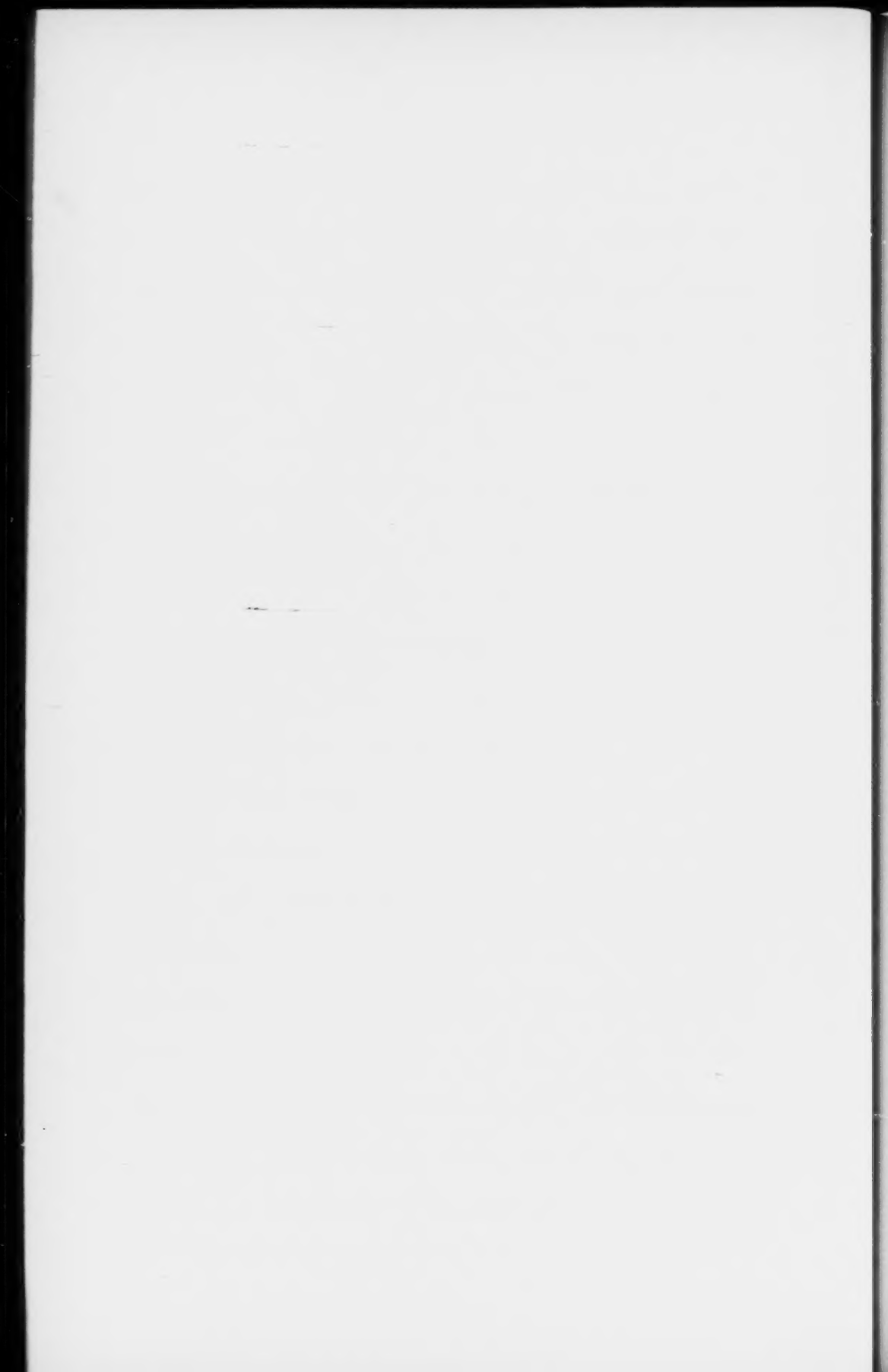
Complaint, ¶12. This harassment, allegedly undertaken by the defendant through his positions with the university, included, inter alia, the following forms: the defendant participated in, condoned, and failed to prevent an ongoing program of harassment, interference and non-cooperation by Dr. William H. Hunt, the Director of the Division of Neurologic Surgery in the Department of Surgery and the Chief of the Clinical Division of Neurologic Surgery; on May 5, 1978, the defendant, without adequate investigation, submitted a groundless charge of grave misconduct against Dr. Yashon in connection with the inclusion of the name of another faculty member as a research consultant on an application for a research grant;



in December, 1978, the defendant summarily excluded Dr. Yashon from the list of those to whom general surgery residents would be assigned for training and participated in the summary removal of Dr. Yashon from the residency training program in neurologic surgery; on October 27, 1979, the defendant instituted procedures to force the removal of Dr. Yashon from the attending medical staff of University Hospitals despite the fact that the charges made by defendant were recklessly proffered with little or no investigation and with the purpose of destroying Dr. Yashon's career as an academic surgeon; the defendant denied Dr. Yashon access to medical records, access to which was necessary to defend against the charges filed on October 27, 1979; on May 31,



1980, the defendant, without authority and without an adequate factual basis, summarily and indefinitely suspended Dr. Yashon's admission and operating room privileges at University Hospitals; the defendant has established, approved and/or acquiesced in hospital practices and policies that discriminate against Dr. Yashon; the defendant has precluded Dr. Yashon from performing valuable and necessary research; the defendant has verbally berated Dr. Yashon through inaccurate accusations of misfeasance, malfeasance, or nonfeasance in the presence of third persons; and the defendant has made numerous inaccurate oral and written criticisms of Dr. Yashon's performance under his contracts with the university to Dr. Yashon's colleagues, superiors, and



various committees of University Hospitals. (Complaint, ¶13(a) - (e), (g), (i) - (l).)

Based on these allegations, Dr. Yashon stated five claims for relief that, he prayed, justified an award of \$5,000,000 in compensatory damages and \$5,000,000 in punitive damages.⁵ These claims were:

FIRST: That defendant's tortious harassment of Dr. Yashon has rendered it more difficult and, in some cases, impossible for Dr. Yashon to perform under his contracts with the university, and that defendant intends by such harassment to prevent Dr. Yashon entirely from

performing his duties under
said contracts;

SECOND: That, since January,
1976, defendant has
tortiously engaged in a
pattern of extreme and
outrageous conduct;

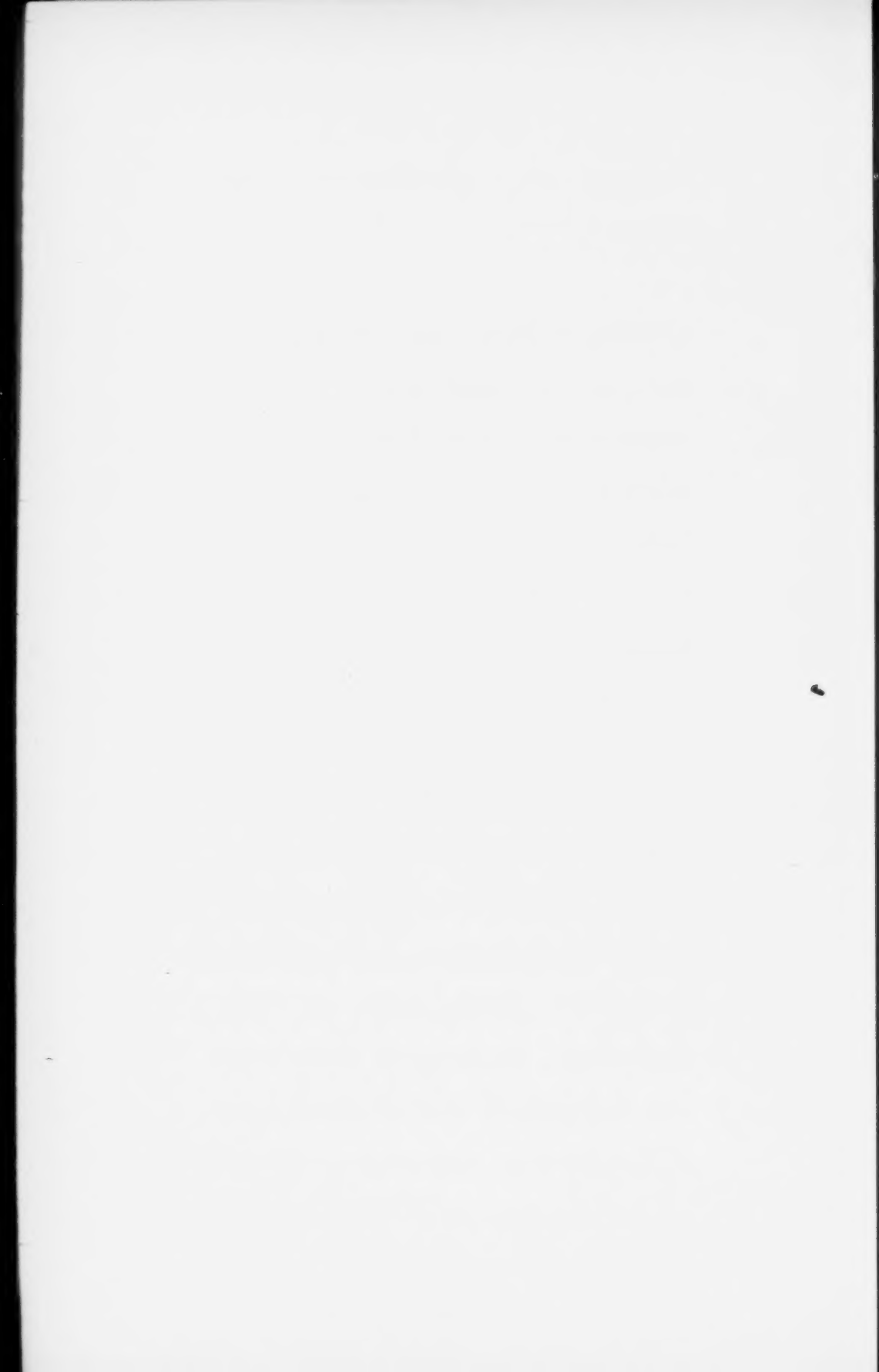
THIRD: That the defendant,
through his on-going acts of
harassment, has jeopardized
Dr. Yashon's professional and
career prospects, impaired
his liberty to practice his
profession, impaired his
right to make, enforce, and
perform contracts, including
his contracts with the
university, and violated his



rights to procedural due process;

FOURTH: That the defendant, during a meeting of the executive committee of the medical staff of University Hospitals, knowingly and maliciously made false and defamatory statements about Dr. Yashon; and

FIFTH: That the defendant did willfully and maliciously make defamatory statements about Dr. Yashon to members of other hospitals in the Columbus, Ohio area and that the defendant did communicate unflattering statements about Dr. Yashon to department

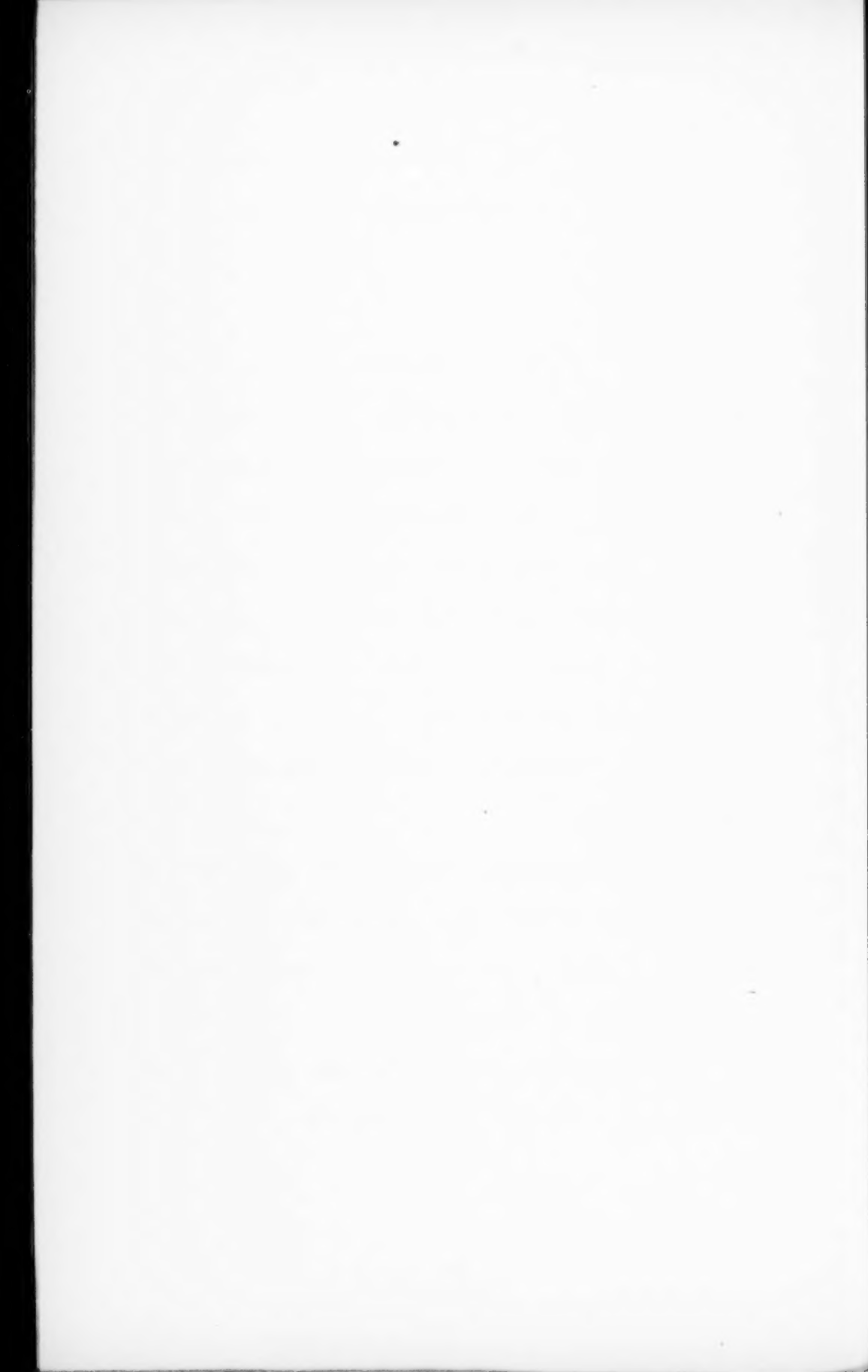


chairmen at other medical
schools throughout the
country.

As was the case in Yashon I, the above
claims also allegedly resulted in
injury to Dr. Yashon's professional
reputation, in impairment of his
ability to function as an academic
neurosurgeon and to provide quality
medical care for his patients at
University Hospitals, and in mental
distress, anguish, embarrassment, and
humiliation.

The defendant, Dr. Carey, filed an
answer on March 30, 1981 in which he
denied all of the substantive
allegations of wrongdoing.

Subsequently, on June 29, 1981, the
plaintiff filed a motion for a



preliminary injunction. The basis for this motion was Dr. Carey's allegedly unconstitutional failure to recommend Dr. Yashon's reappointment to the attending medical staff of University Hospitals for the period beginning July 1, 1981.⁶ Dr. Carey filed a motion to dismiss the motion for a preliminary injunction on July 2, 1981 in which he argued (1) that the motion for a preliminary injunction was improper because Dr. Carey was not empowered to grant the relief requested, that is, Dr. Yashon's reinstatement to the attending medical staff and (2) that the motion was premature in that Dr. Yashon had failed to pursue his administrative remedies.⁷

To date, no further action has been taken in this case.



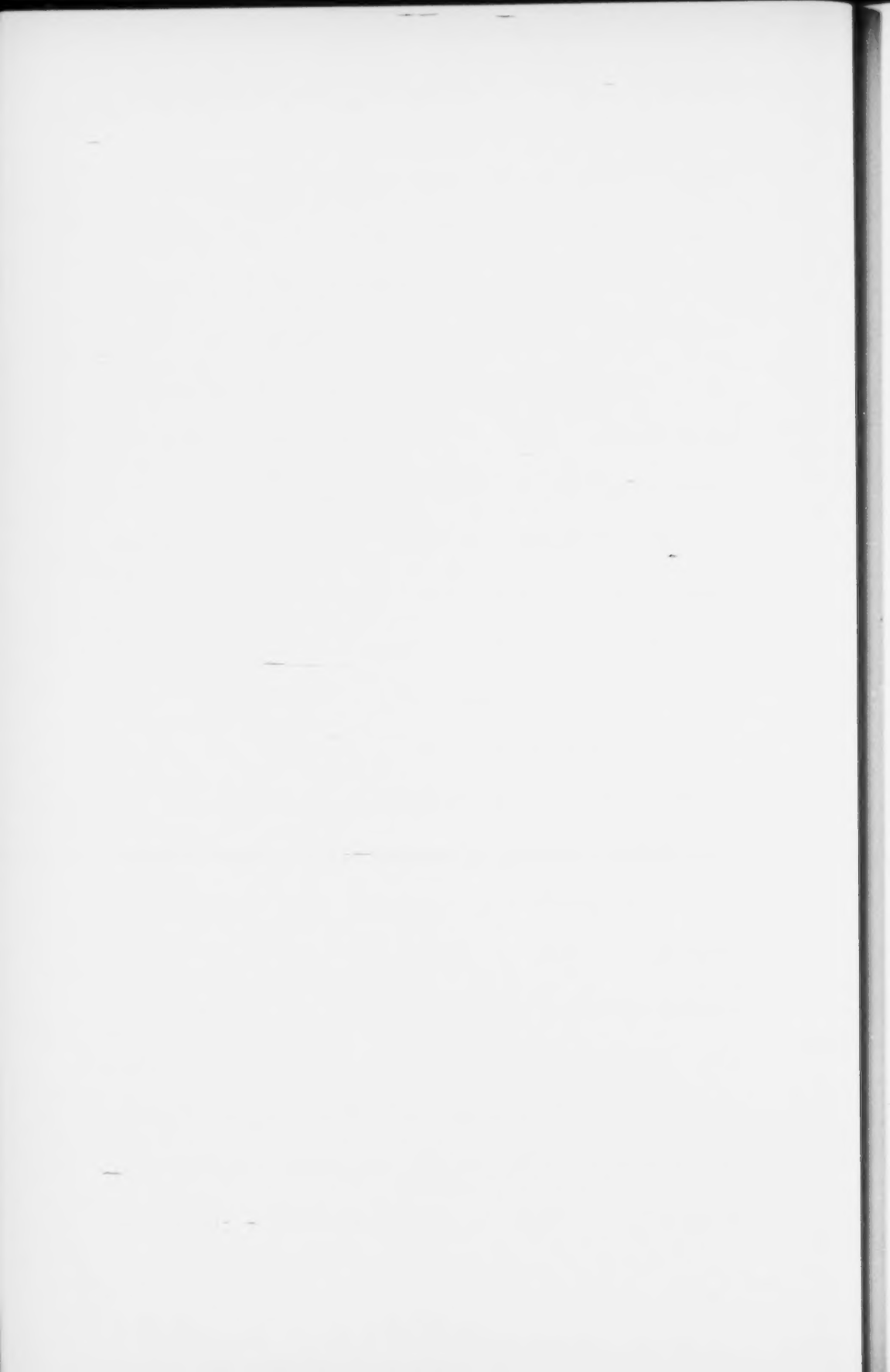
3. Yashon III

On July 16, 1981, Dr. Yashon and Thomas Hawk, M.D. filed a civil rights action; David Yashon, M.D., et al v. William E. Hunt, M.D., et al, C-2-81-867 [hereinafter Yashon III]. Named as defendants in the verified complaint are Dr. Hunt, Dr. Carey, the individual members of the Board of Trustees of The Ohio State University,⁸ the individual members of the University Hospitals Board,⁹ the individual members of a Joint Conference Committee,¹⁰ and the individual members of the Medical Staff Administrative Committee.¹¹ According to plaintiffs, this action was "instituted to redress and enjoin the ongoing and threatened actions of



defendants Hunt and Carey to deprive plaintiffs of equal protection of the laws and of their property and liberty interests without due process of law, in violation of the Fourteenth Amendment to the United States Constitution." Complaint, ¶13.¹²

Dr. Yashon alleges in the verified complaint that he entered into a contract with The Ohio State University, effective September 1, 1969, pursuant to which he was appointed as an Associate Professor in the Department of Surgery. The terms of this contract include the letter of offer, the annual notices of appointment, the relevant statutes of the State of Ohio, the bylaws of the Board of Trustees of The Ohio State University, the rules of the university faculty, the departmental and/or



college statement of criteria and procedures for promotion and tenure, the faculty handbook, the operating manual, the University Hospitals Board bylaws, and any written understandings between Dr. Yashon and the university regarding his employment. Pursuant to this contract, Dr. Yashon was awarded tenure in 1976 and was promoted to the position of full professor in the Division of Neurologic Surgery of the Department of Surgery in 1974. (Complaint, ¶¶16 - 18.)

Dr. Yashon further alleges that, effective September, 1969, he was appointed to the attending medical staff of University Hospitals; this appointment was concurrent with and a result of his appointment to the faculty and was in accord with the constitution, bylaws, rules and



regulations of the medical staff of University Hospitals. Since 1969, Dr. Yashon's appointment to the faculty and to the attending medical staff have been continued through annual notices of reappointment. The continuing appointment to the attending medical staff has been recognized by the university, according to Dr. Yashon, as an absolute requirement in his role as a professor in the Division of Neurologic Surgery. (Complaint, ¶¶19 - 21.)

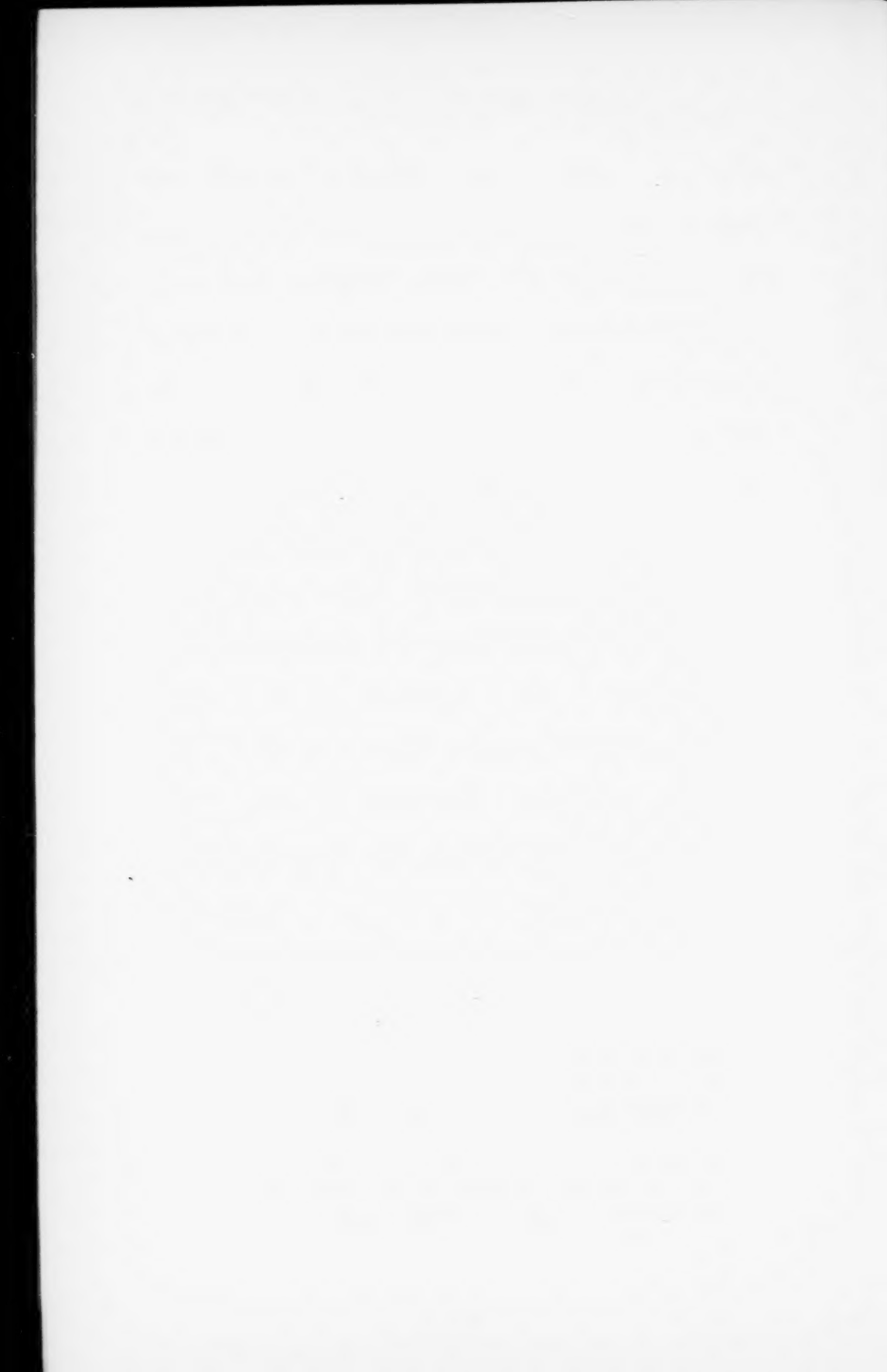
—Prior to June, 1981, Dr. Yashon submitted his application for reappointment to the attending medical staff.¹³ On June 18, 1981, Dr. Manuel Tzagournis informed Dr. Yashon that Dr. Carey had refused to submit his name to the Medical Staff Administrative Committee and that, therefore, as of



July 1, 1981, Dr. Yashon would no longer be a member of the attending medical staff.¹⁴ Dr. Yashon had not been previously notified of Dr. Carey's intention not to recommend his reappointment; in addition, Dr. Yashon had not been told of any outstanding charges against him that would support Dr. Carey's decision nor, if such charges existed, was he afforded any opportunity to respond to such charges. (Complaint, ¶¶29 - 31.)

Dr. Yashon contends that the decision by Dr. Carey not to recommend his reappointment

was [upon information and belief] participated in by defendant Hunt and was a product of the continuous harassment, interferences and deprivations committed by defendants Carey and Hunt in their ongoing effort to force plaintiff Yashon from the University Hospitals and the College of Medicine, in



violation of his contract, tenure and Constitutional rights, as more fully described and set forth in Yashon v. Carey, Civil Action No. C-2-81-411, and Yashon v. Hunt, Civil Action No. C-2-78-066 on the dockets of this Court.

Complaint, ¶32. This latest action by Dr. Carey and Dr. Hunt followed two previously unsuccessful attempts by Dr. Carey to remove Dr. Yashon from or to curtail his privileges as a member of the attending medical staff (Complaint, ¶¶33 - 38).¹⁵

In sum, Dr. Yashon alleges that

[t]he present attempt by Drs. Carey and Hunt to block plaintiff's reappointment to the Medical Staff is in flagrant and malicious disregard of the decisions of the duly constituted committees of the University Hospitals rejecting their prior attempts to remove and/or curtail plaintiff Yashon's clinical privileges, the formal procedures established by the



Constitution and Bylaws of the Medical Staff for such removal or curtailment, plaintiff's status as a full, tenured Professor, the Rules of the University Faculty specifying the procedures by which plaintiff's contract and tenure may be terminated for cause, plaintiff's established right to reappointment, and plaintiff's rights to due process and equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution.

Complaint, ¶39.

Based on these allegations, Dr. Yashon puts forth four claims for relief. Under his first, second, and third claims, he states alternate theories to support his contention that the attempted termination of his membership on the attending medical staff violated numerous of his constitutional rights and specifically deprived him of his property and



liberty - without due process of law.

Dr. Yashon contends:

1. That, pursuant to the rules of the university faculty, the bylaws of the University Hospitals Board, and the constitution and bylaws of the medical staff of University Hospitals, he was entitled to have his appointment to the attending medical staff continued through annual reappointments, subject to his medical staff privileges being terminated only on the grounds and pursuant to the procedures established for revocation of his tenure and/or the grounds and



procedures established for removal of medical staff privileges under the constitution and bylaws of the medical staff;

2. That, pursuant to the custom and usage of the University Hospitals in routinely and automatically reappointing him and others to the attending medical staff, he had a reasonable expectation that he would continue to be reappointed to the medical staff annually, unless he was removed on grounds and pursuant to procedures established for the termination of his right to engage in clinical



teaching and academic
medicine; or

3. That, as a tenured member of the faculty, he is entitled to continued reappointment to the attending medical staff, subject to that membership being terminated only pursuant to the rules of the university faculty governing the grounds and procedures for termination of tenure.

Complaint, ¶¶46, 48, 50. Finally, under his last claim,¹⁶ Dr. Yashon states that he is entitled to reappointment to the attending medical staff because the procedures



"purportedly" followed by defendants in denying his reappointment are constitutionally defective. Complaint, ¶54.17

In his prayer for relief, Dr. Yashon asked that the Court grant preliminary and permanent injunctive relief (1) compelling defendants to reinstate him to membership on the attending medical staff of University Hospitals with all rights and privileges pertaining thereto, including full participation in the residency training program in Neurosurgery; and (2) restraining Drs. Hunt and Carey from further attempting to discharge, dismiss, or terminate Dr. Yashon from the attending medical staff without complying with the requirements and procedures of the rules of the university faculty and the



constitution, bylaws, rules and regulations of the medical staff and from further attempting to harass, threaten, coerce, or intimidate Dr. Yashon into terminating his relationship with University Hospitals or with The Ohio State University.

B.

Simultaneous with the filing of the complaint in Yashon III on July 16, 1981, the plaintiffs filed a motion for a temporary restraining order. On July 17, 1981, the Court filed a consent order in Yashon III:

It is hereby agreed and so ordered that, in order to preserve the status quo until the Court renders a decision upon the plaintiffs' request for a preliminary injunction, or until said request is otherwise resolved, Dr. David Yashon and Dr. Thomas Hawk



are granted the same rights and privileges which they each had at The Ohio State University Hospitals as of June 30, 1981.¹⁸

This consent order had been expressly approved by counsel for both parties.

On July 17, 1981, the Court also conferred in chambers with Rudolph Janata, trial attorney for Dr. Yashon, and John Elam, trial attorney for the defendants. In the course of this conference, the Court stated that Dr. Carey

should forward plaintiff Yashon's application for reappointment to the medical staff . . . to the Medical Staff Administrative Committee of The Ohio State University Hospitals for disposition in the same routine manner as other such applications for reappointment were processed. Judge Kinneary indicated that his directive was prompted by consideration of judicial economy; if the Medical Staff Administrative



Committee acted favorably on plaintiff Yashon's application for reappointment to the medical staff, the present lawsuit would be moot.

Mr. Elam then requested that defendant Carey be allowed to explain to the Medical Staff Administrative Committee his reasons for refusing to recommend the reappointment of plaintiff Yashon to the medical staff. Judge Kinneary agreed to this request, stating that defendant Carey be allowed to explain to the Medical Staff Administrative Committee his reasons for refusing to recommend the reappointment of Yashon to the medical staff and that plaintiff Yashon be afforded an opportunity to respond to defendant Carey's explanation. Judge Kinneary stated that he did not want a "hearing" as such and that no counsel were to be present at the meeting of the Medical Staff Administrative Committee held to consider plaintiff Yashon's application for reappointment to the medical staff.

At no time did Judge Kinneary suggest, indicate or order that the Medical Staff Administrative Committee



conduct a "due process" hearing on plaintiff Yashon's application for reappointment to the medical staff, at which hearing witnesses could be called and examined. Instead, Judge Kinneary suggested that plaintiff Yashon and defendant Carey each make a presentation to the Medical Staff Administrative Committee concerning plaintiff Yashon's application for reappointment to the medical staff.

Affidavit of Rudolph Janata at ¶13, appended as Exhibit A to Plaintiff David Yashon, M.D.'s Memorandum in Opposition to Defendants' Motion to Vacate Consent Order and for Summary Judgment [hereinafter Janata Affidavit].

With the consent order in effect, the matter of Dr. Yashon's reappointment to the attending medical staff was now back with the university.



1. Notice of the Hearing

In late July, Dr. Michael E. Whitcomb contacted Dr. Yashon and informed him of his plans to arrange a meeting of the Medical Staff Administrative Committee to consider Dr. Carey's refusal to recommend Dr. Yashon's reappointment to the medical staff at University Hospitals. App. A at 360-61.¹⁹ The hearing before the Medical Staff Administrative Committee was scheduled for September 1, 1981 at 7:30 a.m.; Dr. Yashon was given notice of the meeting by letters from Dr. Tzagournis and Dr. Whitcomb. App. B, Attachments I and II.²⁰ Subsequent to Dr. Yashon's receipt of these letters, both Dr. Tzagournis and Dr. Whitcomb communicated with him by telephone; they both explained to Dr. Yashon that,



apart from the reasons outlined by Dr. Carey in his August 14, 1981 letter to Dr. Tzagournis, see App. B, Attachment III, they had no knowledge of any witnesses who might be called by or of any documents that might be presented by Dr. Carey at the September 1 hearing. App. A at 362-63.²¹

Thus, the only information formally provided Dr. Yashon prior to the hearing was that contained in Dr. Carey's letter to Dr. Tzagournis. This letter, copies of which were not distributed by Dr. Whitcomb to members of the Medical Staff Administrative Committee prior to the September 1 hearing, App. A at 48, 362, explained the basis for Dr. Carey's refusal, as Chairman of the Department of Surgery, to recommend Dr. Yashon's reappointment to the medical staff. As a prelude to



more specific charges justifying his action, Dr. Carey stated:

Because the University Hospital is a teaching institution, its faculties must be limited to those making a positive contribution in that area. The basis for my refusal to recommend Dr. Yashon's reappointment is that his activities and professional conduct over the past five years at The Ohio State University have violated the standards of the medical staff and have been disruptive to the Clinical Division of Neurosurgery and the University Hospitals in general. His actions of harassment, disruption, insubordination, lack of cooperation, and misconduct among fellow members of the medical staff, the administration of University Hospitals, and other non-M.D. staff members at the University have created a negative environment for the effective teaching of medicine at The Ohio State University Hospitals. His activities in manipulating the University Hospitals policies, practices, and procedures are totally incompatible with advancing



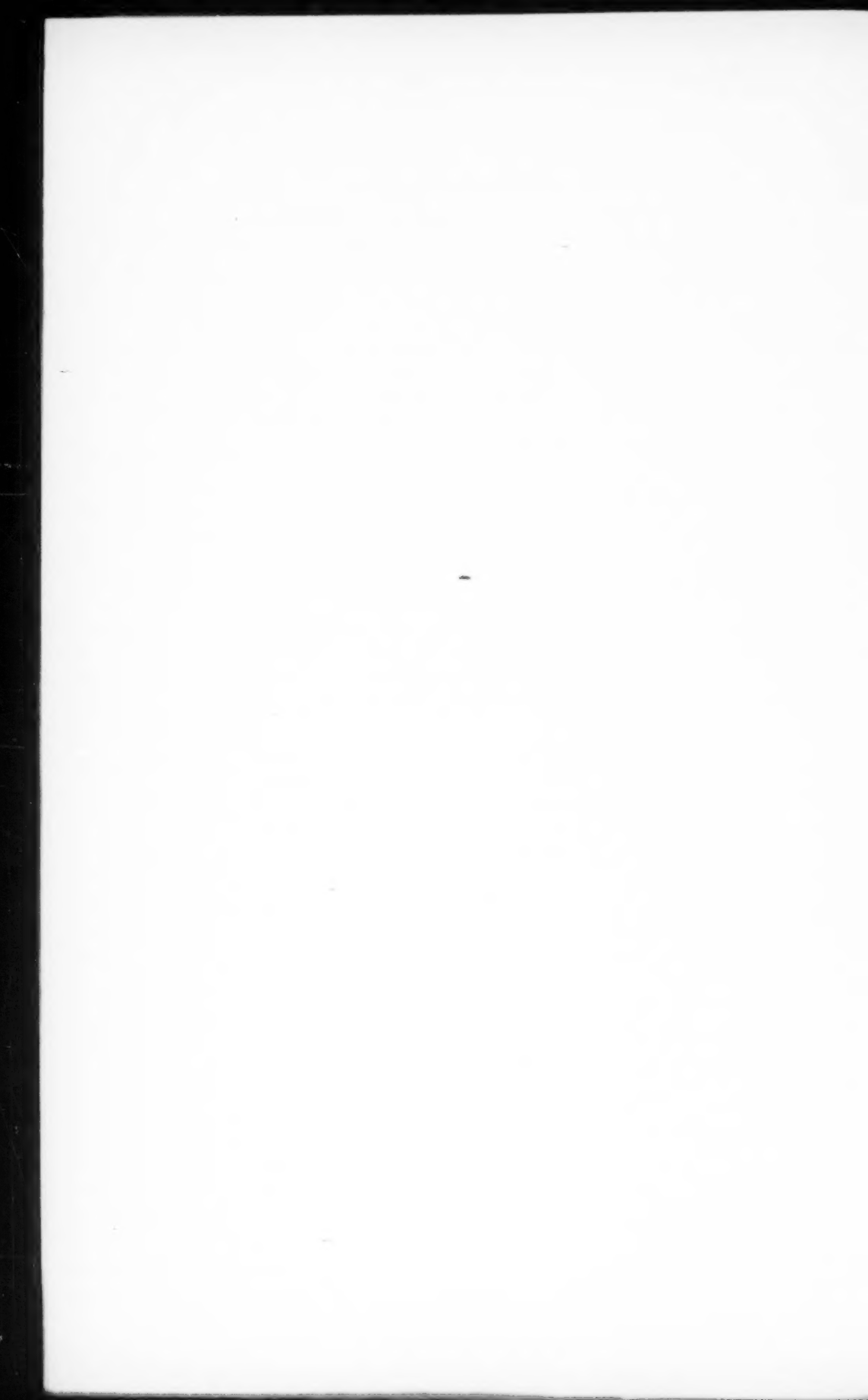
the goals of this teaching hospital; instead he is apparently interested in only advancing his own personal gain.

App. B, Attachment III at 1. Apart from this general statement, Dr. Carey went on to catalogue a series of more specific reasons which, he believed, supported his decision not to recommend Dr. Yashon's reappointment:

1. Dr. Yashon's participation in the training program in General Surgery and Neurologic Surgery including:
 - a. his continual efforts to achieve reinstatement as a member of the neurosurgery training program by disruptive and harassing means in direct contravention of his agreement as a part of a settlement in Federal Court and his failure to seek

reinstatement by
the proper method
agreed upon --
requesting a
hearing to
determine his
qualifications
before at least
three members of
the Residency
Review Committee;

- b. his persistence in
admitting patients
who he knows will
require resident
care despite the
fact he is not a
member of the
neurosurgery
training program;
- c. his total failure
to provide proper
and adequate
direction for the
care of his
patients to the
residents and
nurses involved in
the care of those
patients;
- d. his failure to
respond
appropriately to a
specific request of
a resident that he
come to the
hospital and attend
a patient;



- e. his attempts to hire residents to perform myelograms and other duties;
 - f. his failure to provide adequate supervision to residents.
2. Dr. Yashon's undesirable behavior which sets a bad example for house staff and students, including:
- a. his adding another faculty member as a consultant on a grant without permission of the faculty member;
 - b. his use of another faculty member's material in a publication without permission of the faculty member;
 - c. his unauthorized copying of the confidential charts of other physicians' patients;
 - d. his improper offering to pay clerical staff members of the



medical records
department;

3. Dr. Yashon's rifling of departmental records and the unauthorized removal of confidential records, including confidential mortality and morbidity records, from another faculty member's office.
4. Dr. Yashon's admitting patients as "add-on" patients to take advantage of the admitting system, and to avoid the ceiling on admissions applicable to all surgeons when, in fact, the patients were not in an "add-on" state.
5. Dr. Yashon's improper use of medical charts by removing notations.
6. Dr. Yashon's arbitrary removal of patients of other physicians from beds in order to make room for his own patients, and his general disregard for census limitations.
7. While under summary suspension, Dr. Yashon's improperly arranging for the admission of patients.



8. Dr. Yashon's negative and abusive behavior such that neurosurgical residents have requested relief from working with him.
9. Dr. Yashon's verbally falsifying to the Chairman of the Department his operative surgery results. -
10. Dr. Yashon's seeking a faculty appointment of an associate for the sole purpose of private practice.
11. Dr. Yashon's improperly scheduling and performing neurosurgery without assistance or intensive care bed availability.
12. Dr. Yashon's failure to avail himself of appropriate appeal mechanisms within the University to resolve disputes.
13. Dr. Yashon's failure to discuss with a colleague a request for a consultation by a family.
14. Dr. Yashon's refusal to abide by legitimate rules regarding



supervision of surgery
by residents.

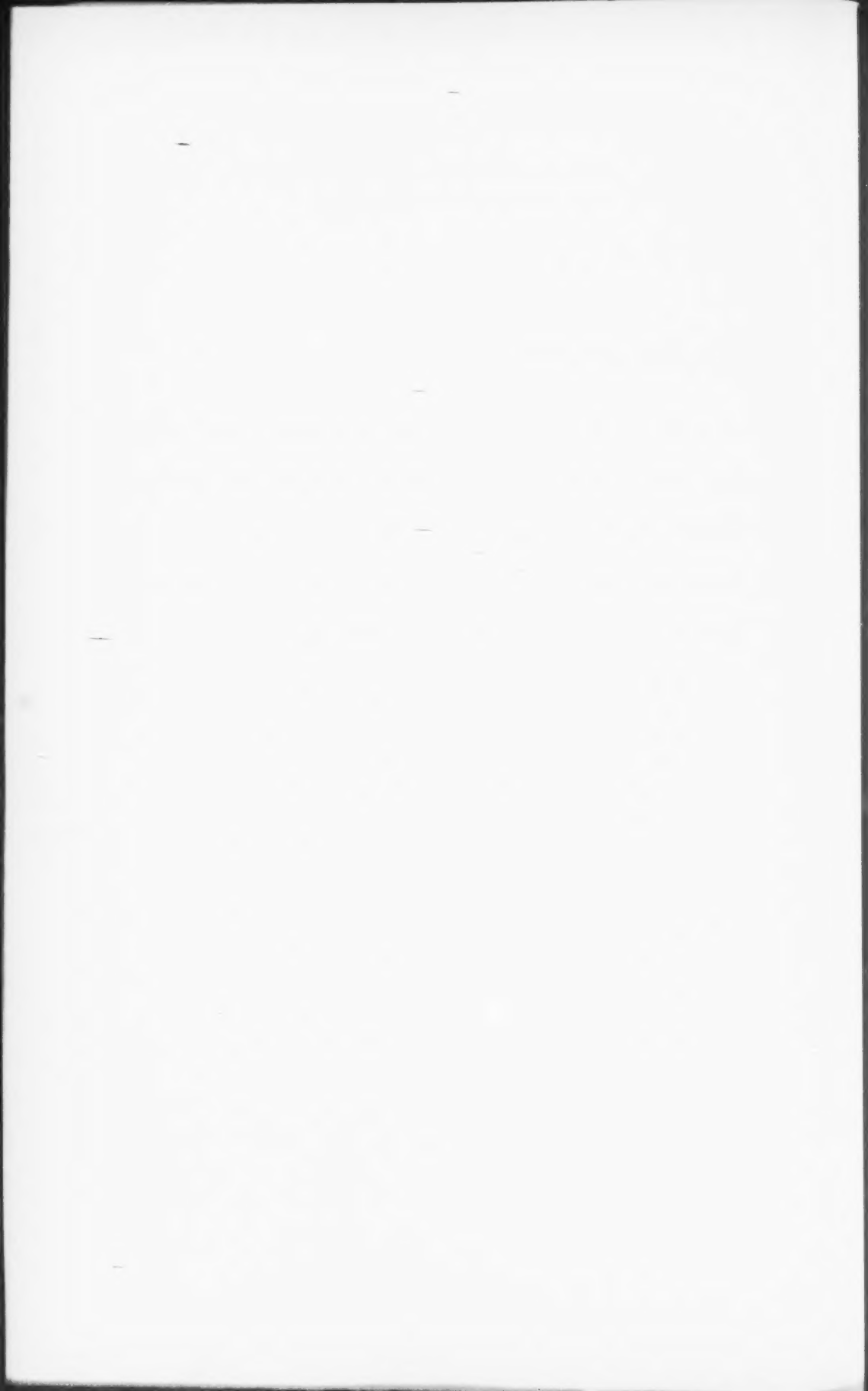
Id. at 1 - 3.

2. The Hearing

Dr. Michael E. Whitcomb, Chairman of the Medical Staff Administrative Committee, began the September 1 hearing with a brief explanation as to the purpose of the proceedings:

As you all know, our purpose here this morning is to review Dr. Yashon's application or request for reappointment to the medical staff. Dr. Carey, as you know, did not recommend reappointment, and our purpose today specifically is to hear Dr. Carey's reasons why he chose not to recommend reappointment of Dr. Yashon and to give David an opportunity to respond to whatever issues Larry may raise.

I would like to point out, this is not a court of law.



We have no absolute set guidelines in terms of the proceedings which we are compelled to follow, but our format will be such that I will ask Larry if he chooses and David if he chooses to make some initial comments . . . and then for Larry to present specific reasons why he chose not to recommend David to the staff and, as we go through the process, to allow David to respond to those point by point.

App. A at 4 - 5. Dr. Whitcomb also stressed

that our goal here today really is to deal with Dr. Yashon's request for reappointment. I think we should keep our discussions within that context. This is not the time for us to go far afield in dealing with other individuals or other things which are not relevant to appointment to the medical staff of the university hospitals and what that means in its entirety.

Id. at 6.

Consistent with these procedural guidelines, both Drs. Carey and Yashon

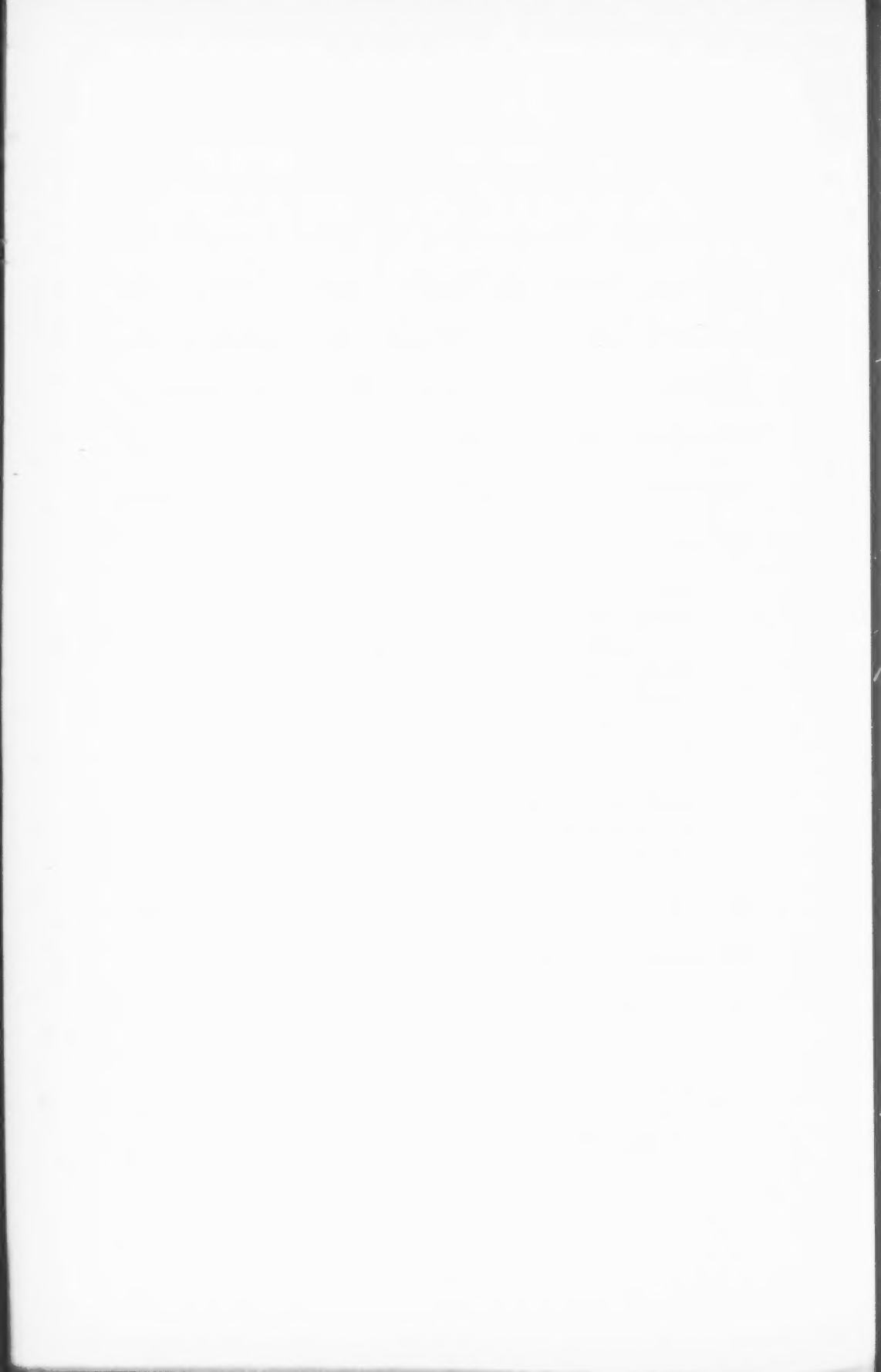


made opening statements. Dr. Carey, after presenting a brief outline of the Yashon I litigation, of the course of events that followed the filing of charges by him against Dr. Yashon in October, 1979, and of the events leading up to the September 1, 1981 hearing, explained that it was his intent

to provide evidence to this committee, that Dr. Yashon is an undesirable member of this hospital staff, that his conduct in a variety of arenas has been so bad that he should not continue to set an example for our students and our residents, nor to be involved in providing patient care in this institution.

Id. at 15. As to the witnesses and documentary evidence he would present, Dr. Carey cautioned that

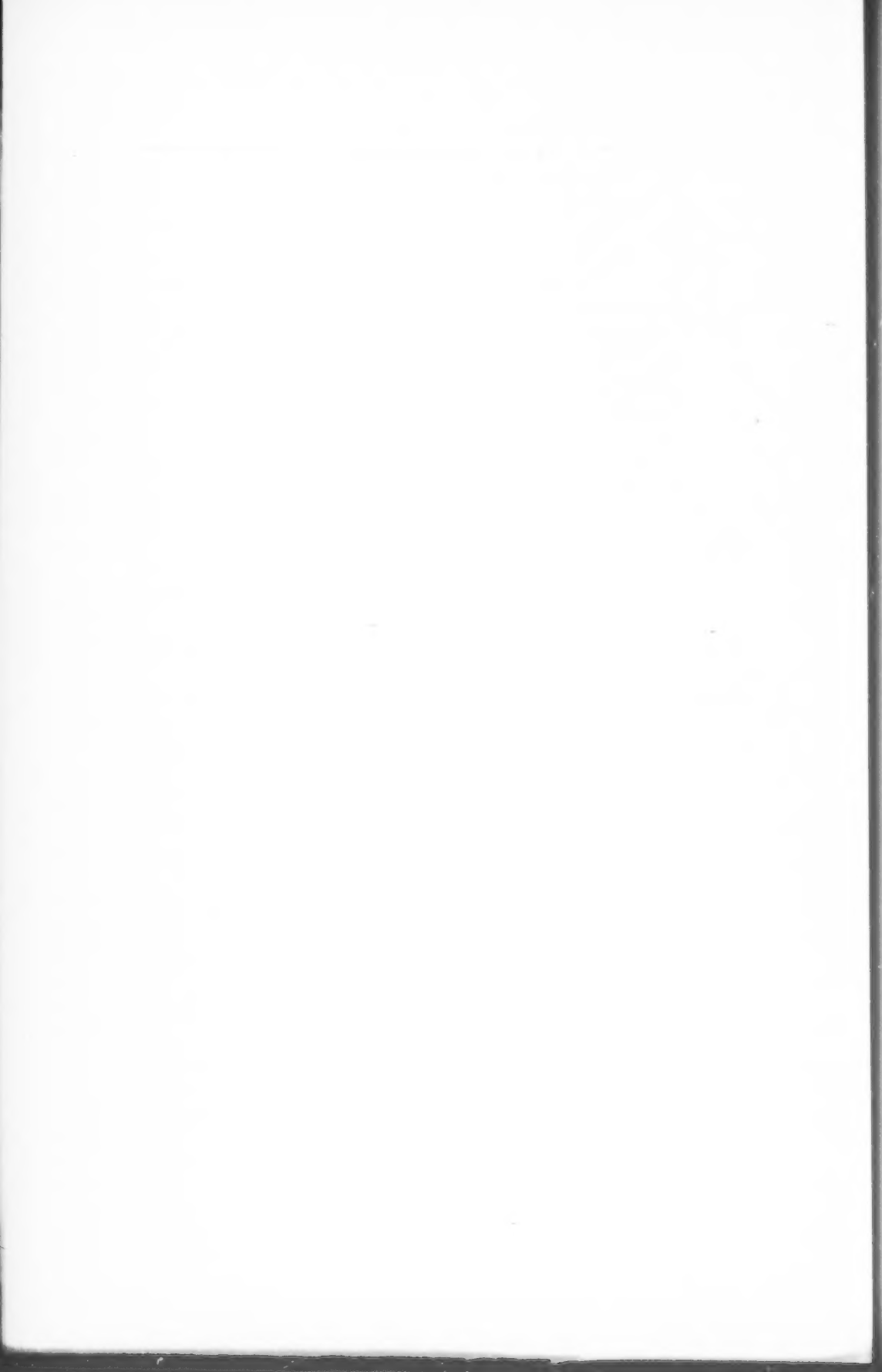
I am in no position now, nor have I been in the past, to evaluate Dr. Yashon's competence as a



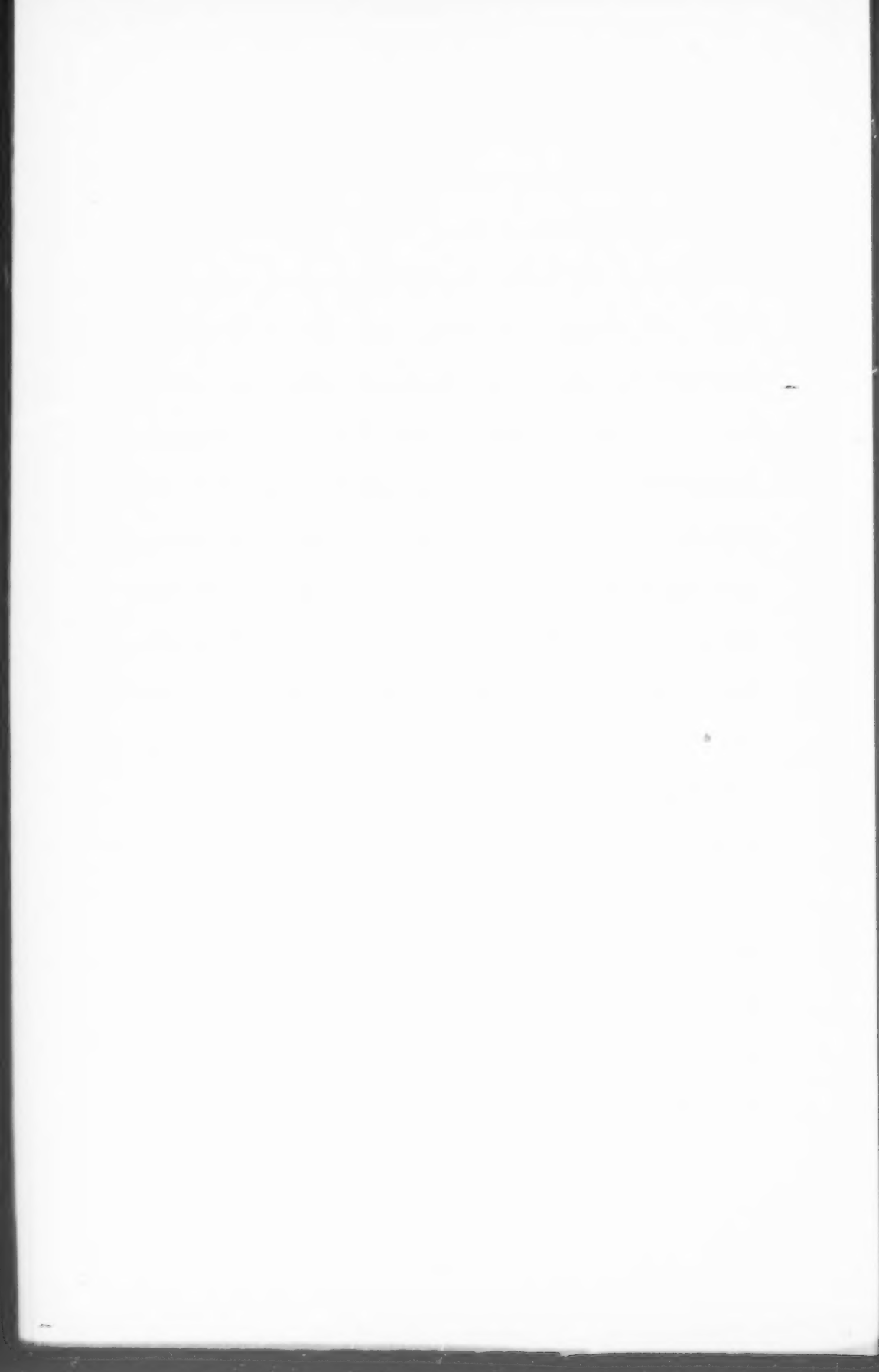
neurosurgeon. It is my opinion that can only be done by another neurosurgeon. But I believe I am in a position and have the responsibility of determining whether or not an individual in the Department of Surgery is competent to practice in this institution. That says little specifically about his competence as a physician. It says something about his propriety as a member of the staff of a teaching hospital.

Id.

Dr. Yashon, for his part, claimed that his experiences at Ohio State University had been most satisfactory until 1975, during which time differences arose between him and Dr. Hunt that caused him to leave Dr. Hunt's corporation and to set up his own practice corporation. Id. at 23 - 24. Since that time, both Drs. Hunt and Carey caused him numerous problems in executing his teaching and medical



practice duties. Id. at 24 - 25, 27. In addition, Dr. Yashon noted a number of objections to the format and substance of the hearing: that he had not received notice of Dr. Carey's intent to call witnesses (id. at 27 - 28); that most of the reasons - delineated in Dr. Carey's letter of August 14, 1981 to Dr. Tzagournis were previously reviewed and found groundless by a grievance committee (id. at 28 - 40); that he had an inadequate opportunity to prepare a response to those of Dr. Carey's charges that were not reviewed by the grievance committee (id. at 29 - 30); that the Medical Staff Administrative Committee was not the proper forum to review the charges made by Dr. Carey in his August 14, 1981 letter to Dr. Tzagournis (id. at 30); and that, as a



tenured faculty member, his membership on the attending medical staff could only be terminated by resort to the university procedures for detenurization (id. at 41 - 42, 46 - 47).

Dr. Carey then proceeded to call thirteen witnesses. The format with respect to each witness was basically the same; Dr. Carey would make some introductory remarks and would then direct questions to the witness. Dr. Yashon and the members of the committee would then have an opportunity to direct questions to the witnesses; throughout the hearing, moreover, members of the committee would direct questions to Drs. Carey and Yashon as well. Thus, both Drs. Carey and Yashon were themselves witnesses to some matters.



Upon a review of the testimony presented at the hearing of the Medical Staff Administrative Committee, the Court finds that testimony was presented as to the following charges in Dr. Carey's letter to Dr. Tzagournis:

<u>Charge</u>	<u>Witness</u>	<u>Transcript</u>
1(a)	Dr. Hunt	App. A at 314
1(b)	Dr. Hunt	App. A at 314-15
1(c)	Warren H. Leimbach, M.D. Ms. Karen Nedelka Rees Freeman, M.D.	App. A at 76-79 App. A at 87-90, 92 App. A at 160, 167-72, 174-75, 182-84, 199-202
	Kevin McGaharan, M.D. Stephen Hill, M.D. Dr. Hunt Dr. Yashon	App. A at 204 App. A at 220-25, 230 App. A at 315 App. A at 94-95, 192-98, 202-03
1(d)	Ms. Nedelka Dr. Freeman Dr. Yashon Dr. Goodman	App. A at 87-88 App. A at 161-67, 188-91 App. A at 176-80 185-88 App. A at 277-80

1(e)	Dr. Goodman Dr. Yashon	App. A at 300-02 App. A at 301-03
1(f)	Dr. Freeman Dr. McGaharan Dr. Hill Dr. Goodman Carole A. Miller, M.D. Dr. Hunt Dr. Yashon	App. A at 160, 167-72, 174-75, 182-84 App. A at 206-08 App. A at 220, 230 App. A at 280-81 App. A at 262, 266-68 App. A at 315-16 App. A at 341-42
2(a)	Ronald St. Pierre, Ph.D.	App. A at 101-06, 111-114, 135-45, 147-48 App. A at 116-35
2(c)	Dr. Yashon Dr. Goodman	App. A at 281-82
2(d)	Ms. Mary Lou McCartney Dr. Yashon	App. A at 234 App. A at 242
3	Dr. Carey	App. A at 243-45

Theodore Teterick, M.D.

Dr. Yashon

Dr. Hunt

Dr. Yashon

Dr. Carey

Dr. McGaharan

Dr. Hill

Dr. Goodman

Dr. Hunt

Dr. Carey

Dr. Yashon

Dr. Goodman

Dr. Yashon

Dr. McGaharan

Dr. Hill

Dr. Hunt

Dr. Yashon

App. A at 245-46,
248-50

App. A at 246-54

App. A at 318-20

App. A at 333-35

App. A at 85

App. A at 206-08

App. A at 220-21

App. A at 274-76

App. A at 323-24

App. A at 237-39, 241

App. A at 240-41

App. A at 282-84

App. A at 333

App. A at 207-08

App. A at 220

App. A at 315-16

App. A at 341-42



Further, there was no testimonial evidence as to charges 2(b), 4, 6, 10, 11, and 12.²²

All of the testimony relevant to Dr. Carey's charges against Dr. Yashon can be broken down into four categories: the charges as to which testimony was not challenged by Dr. Yashon; the charges as to which there was conflicting testimony, thus leaving committee members with the problem of weighing the credibility of the various witnesses; the charges as to which only conclusory testimony was presented; and the charges as to which Dr. Yashon probably could have presented witnesses on his behalf.

Under the first category, Dr. Yashon either did not deny the following charges or acknowledged the



conduct alleged, but denied that the conduct itself was improper: that he attempted to hire a resident to perform myelograms (charge 1(e)); that he, without authorization, copied the charts of another physician, that is, Dr. Goodman (charge 2(c)); that he improperly offered to pay a clerical staff member of the medical records department to pull charts for him (charge 2(d)); and that he improperly used a medical chart by removing from the chart the notation of another doctor, that is, Dr. Hunt (charge 5).

Under the second category, there was conflicting testimony as to a number of the charges; as to each of these, however, there was sufficient evidence from which members of the Medical Staff Administrative Committee could decide that the testimony against



Dr. Yashon was credible and that, therefore, the charges were meritorious.²³ Included in this category are the following charges: that Dr. Yashon failed to respond to the specific request of a resident, that is, Dr. Freeman, that Dr. Yashon come to the hospital and attend a patient (charge 1(d)); that Dr. Yashon added another faculty member, that is, Dr. St.Pierre, as a consultant on a grant application without his permission (charge 2(a)); that Dr. Yashon, without authorization, removed confidential medical records from the office of another faculty member, that is, Dr. Teterick (charge 3); that Dr. Yashon verbally gave Dr. Carey false figures as to his operative surgery results (charge 9); and that Dr. Yashon failed to discuss with a colleague,

that is, Dr. Hunt, a request for a consultation by a family (charge 13).

Under the third category, there was conclusory testimony as to a number of charges. As to both charges 1(a) and 1(b), Dr. Hunt summarily stated that Dr. Yashon had engaged in such conduct, but he offered no testimony as to any specific conduct.

Finally, under the last category, there are a number of charges as to which testimony was given that could justify a finding that the charges were meritorious; at the same time, the charges are of such a nature as to permit an inference that there are other witnesses whom Dr. Yashon might have called in support of his contention that the charges are groundless or that the charges are of slight importance. Included in this



category are the charges that Dr. Yashon totally failed to provide proper and adequate direction to the residents and nurses involved in the care of his patients (charge 1(c)); that Dr. Yashon failed to supervise residents adequately (charge 1(f)); that Dr. Yashon engaged in negative and abusive behavior such that neurosurgical residents have requested relief from working with him (charge 8); and that Dr. Yashon has refused to abide by legitimate rules regarding the supervision of surgery by residents (charge 14).²⁴

3. Prior Disciplinary Actions

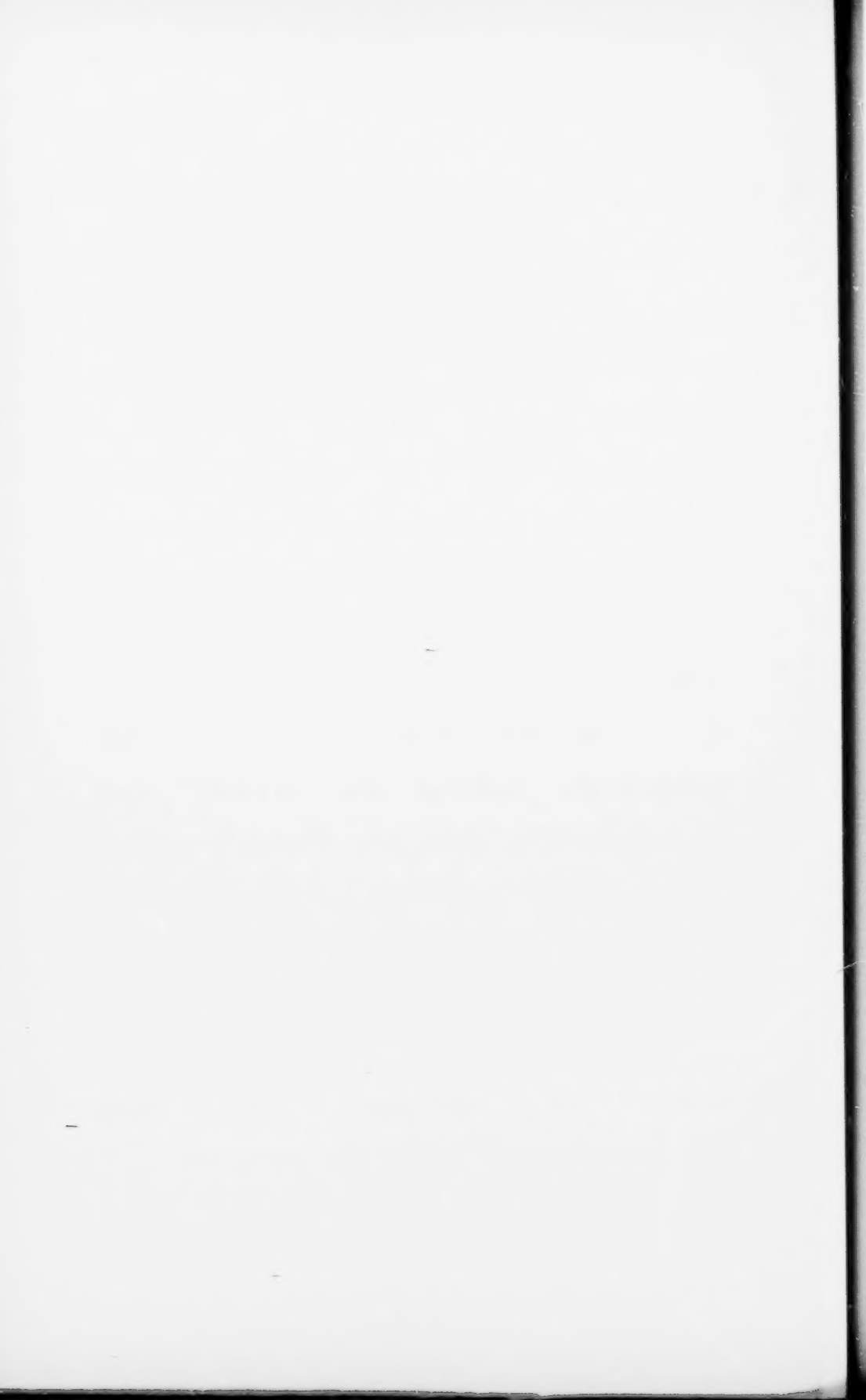
The Medical Staff Administrative Committee was aware that many of the charges as to which Dr. Carey provided



witnesses at the hearing had been the subject of prior disciplinary actions against Dr. Yashon. These disciplinary hearings had reviewed the charges that Dr. Yashon - had included, without authorization, the name of another faculty member as a consultant in a grant application; the charges in Dr. Carey's October 27, 1979 letter to Dr. Henry G. Cramblett, the then Dean of the College of Medicine, which charges, Dr. Carey believed, justified the removal of Dr. Yashon from the attending medical staff of University Hospitals; the charges which resulted in Dr. Carey's May 31, 1980 suspension of Dr. Yashon's admission and operating room privileges at University Hospitals; and the charge that Dr. Yashon had improperly removed a note

written by Dr. Hunt on a patient's chart.

The first charge, that Dr. Yashon had engaged in grave misconduct in including, without authorization, the name of another faculty member as a consultant in a grant application, was reviewed by Dr. Cramblett pursuant to the university rules governing detenurization.²⁵ After reviewing the complaint and the supporting documents, Dr. Cramblett concluded "that the allegations against Dr. Yashon, when taken together with Dr. Yashon's action in formally notifying NIH that Dr. St.Pierre's name should be withdrawn from the grant proposal, does not constitute grave misconduct as that term is defined in Rule 3335-5-04(A)7." App. A at 122. In



explaining his decision, Dr. Cramblett noted that he

regard[ed] the charge against Dr. Yashon as a serious charge. But the effect of this incident alone -- again, when taken with Dr. Yashon's notice to NIH -- is not such that it would seriously impair Dr. Yashon's effectiveness in meeting his defined teaching, service and research obligations.

Id. at 122-23. Accordingly, Dr. Cramblett dismissed the complaint.²⁶

The second set of charges were those contained in Dr. Carey's October 27, 1979 letter to Dr. Cramblett. App. C at 3(C). These charges, most of which were also contained in Dr. Carey's August 14, 1981 letter to Dr. Tzagournis, allegedly justified Dr. Yashon's removal from the attending medical staff.



These charges were reviewed by an Investigation Committee of the Clinical Division of Surgery. Report of Investigation Committee (January 14, 1980). App. C at 2. The Investigation Committee reported:

It is the opinion of the committee that the incidents cited in the charges and the resultant intradepartmental relations have been disruptive. They have disrupted the medical care delivered in the Neurological Surgical Service of the University Hospital and have disrupted the administrative functions of the Neurological Surgical Service in the Clinical Division of Surgery. They have disrupted the Post MD teaching activities of the Neurological Surgical Service in the Clinical Division of Surgery. Moreover the committee feels that the situation has been allowed to continue too long and that disciplinary action should be taken to prevent further disruption.

We have arbitrarily divided the charges into three



groups: disruptive behavior, unprofessional conduct, and clinical incompetence. We regret to say that there are other examples of most of the incidents representing disruptive behavior and unprofessional conduct in which other persons on the hospital staff have been participants. It appears that the charges against Dr. Yashon were made on the basis that the frequency was greater than for other members of the hospital staff. We have no evidence to support this concept since the general frequency of similar incidents is not available. Dr. Yashon was able to document that some of his behavior was similar to that of his accusers in more than one instance. Although significant suggestions of clinical incompetence were made, no one whom we interviewed was prepared to state that Dr. Yashon was an incompetent clinician. In fact, some indicated that he was very competent. This committee does not feel qualified to measure his clinical competence. We feel, however, that this is the most serious charge apparent in our investigation and it should be reviewed. This should be done by



individuals in the field of neurosurgery from outside of the University since it is our opinion that an unbiased evaluation of the current hospital staff would be improbable due to the chronicity of the problem. Dr. Yashon should have input to the selection of his reviewers.

In summary, we feel that the charges are substantial and the disruption caused by the incidents is obvious. We have been unable to find the cause or to place blame. The significance of the suggestion of incompetence is self-evident and action should be taken to settle this for the welfare of the patients and the institution.

Id. Based on this report of the Investigation Committee, Dr. Luther M. Keith, Jr., Vice-Chairman of the Department of Surgery wrote to Dr. Cramblett, Dean of the College of Medicine, and recommended that he take appropriate disciplinary action against Dr. Yashon or submit the matter for



further investigation and consideration by a grievance committee as provided by Article V Section 3 of the constitution, bylaws, rules and regulations of the medical staff of University Hospitals. App. C at 1.²⁷

Dr. Cramblett evidently chose the second option in that a grievance committee was convened to review Dr. Carey's charges. In a report dated July 24, 1980, the committee, composed of five doctors, found that there was no basis for the charge that Dr. Yashon was an incompetent surgeon, that there was no evidence to support the contention that Dr. Yashon was responsible for the disruptive atmosphere within the Division of Neurologic Surgery, and that there was no validity to the charge that Dr. Yashon was responsible for the



resignation of residents and for difficulty in resident recruitment. App. C at 4. The grievance committee, moreover, found that Dr. Yashon had been unfairly harassed by Drs. Carey and Hunt and recommended that Dr. Yashon be restored to all his rights and privileges as a member of the attending medical staff of University Hospitals. Id. Despite the request of Dr. Tzagournis, the then Associate Dean of the College of Medicine, that the grievance committee supply him with additional information to support its findings, App. C at 5, the grievance committee merely reaffirmed its findings and conclusions, while noting that "[a]ll evidence was obtained and reviewed impartially and objectively as well as in complete confidence." App. C at 6.²⁸



On September 30, 1980, Dr. Tzagournis notified Dr. Yashon of his decision as to the charges raised by Dr. Carey. Having reviewed the recommendations of the Investigation Committee and of the Grievance Committee, Dr. Tzagournis determined that

[t]he preponderance of evidence indicates that your activities and professional conduct are considered to be disruptive to your clinical division and University Hospitals. Numerous incidents over several years caused considerable concern to members of the Medical Staff, the non-M.D. staff of University Hospitals, and the Administration. In fact, the training program in Neurosurgery was seriously jeopardized by some of these actions.

It is, of course, very difficult to assign a primary responsibility for each of many incidents, occurring in a milieu of chronic conflict over such an extended period of time. However, I am

persuaded that you are responsible for much of the conflict and disruption which has occurred.

My task is to decide whether grounds for corrective action are substantiated. In view of the conflicting recommendations and opinions available to me, I conclude that they are not sufficient to justify a curtailment or reduction of your clinical privileges but they are sufficient to justify a strong reprimand for your disruptive behavior and activities. Subject to the provisions of the corrective procedures of University Hospitals, this reprimand will become a part of your file.

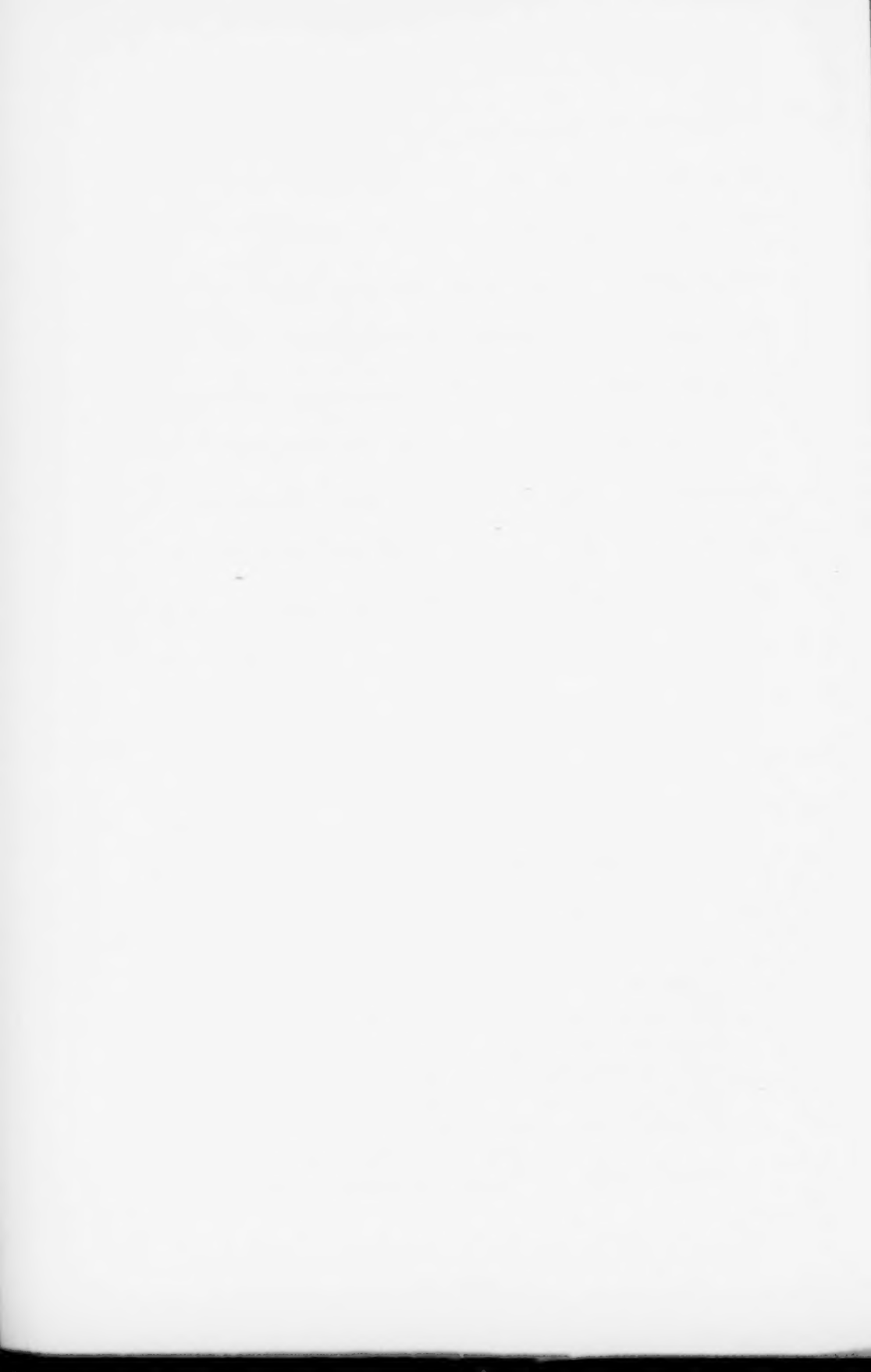
App. C at 7. Pursuant to Article VI of the constitution, bylaws, rules and regulations of the medical staff of University Hospitals, Dr. Yashon appealed the reprimand to Dr. Cramblett, asking that the reprimand be voided and, if not, that the reprimand



be further appealed pursuant to Article VI. App. C at 8.

On October 22, 1980, Dr. Tzagournis, the then Acting Dean of the College of Medicine, wrote to Dr. Yashon and informed him that, pursuant to his request to Dr. Cramblett, the Executive Committee would conduct a hearing on November 2, 1980 to hear Dr. Yashon's appeal of the reprimand. App. C at 9. Dr. Tzagournis made clear that the Executive Committee could confirm, modify, or reject his decision to issue a reprimand; he also specified the charge that would be before the Executive Committee:

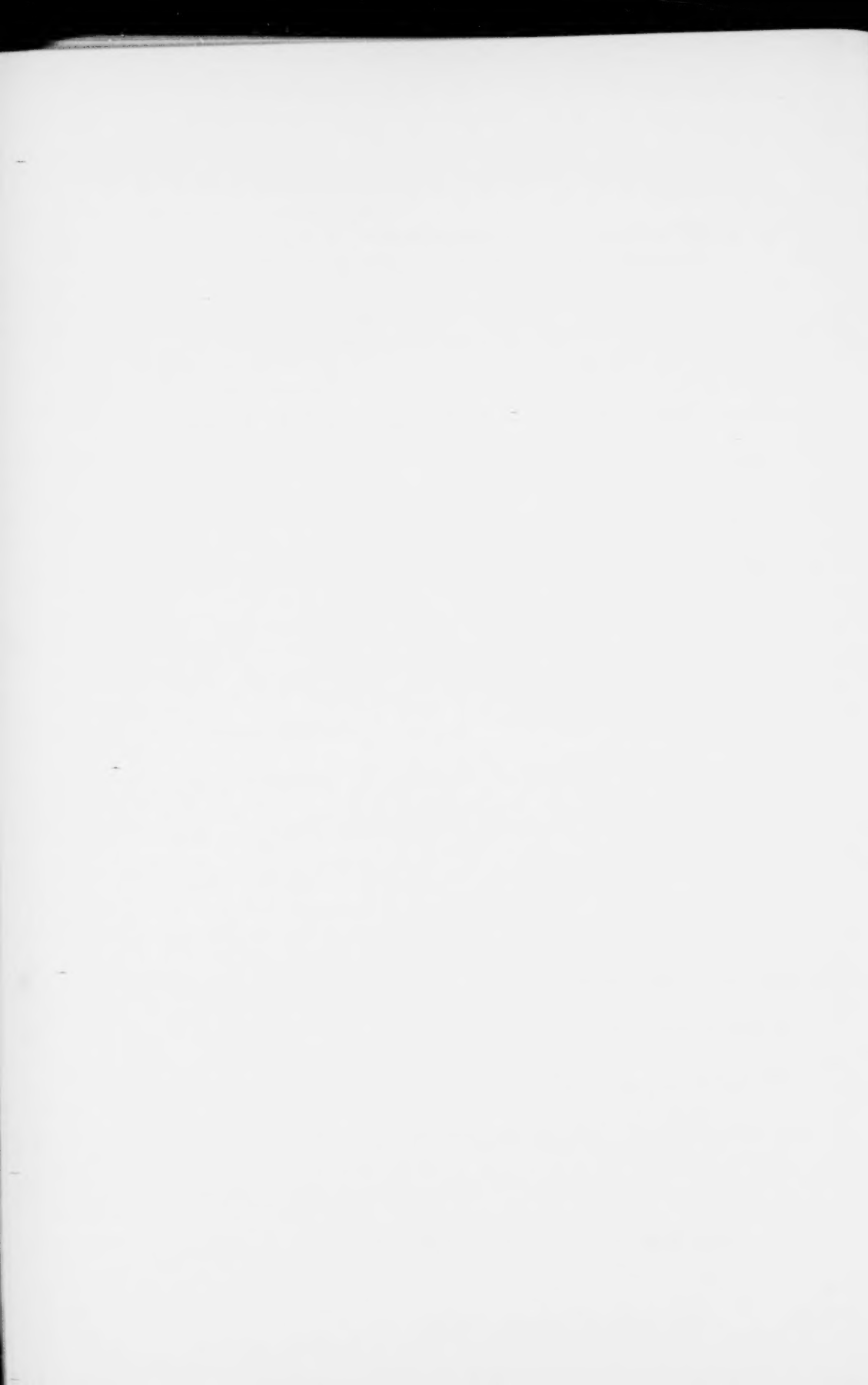
The charge against you is that your activities and professional conduct over the past five years have violated the standards of the medical staff and have been disruptive to your clinical division and University Hospitals. Your conduct on



numerous occasions have caused concern to members of the Medical Staff, the non-M.D. staff and the Administration of University Hospitals.

Id. The letter specified fifteen more specific charges to support this general charge; these fifteen charges had appeared in Dr. Carey's original charges of October 27, 1979, see App. C at 3(C) and supporting documents, and many of them were subsequently reiterated in Dr. Carey's August 14, 1981 letter to Dr. Tzagournis, see App. B, Attachment III. When Dr. Yashon elected to withdraw his appeal of the reprimand, the Executive Committee did not hold its hearing. Yashon II, Plaintiff's Motion for Preliminary Injunction at 13.²⁹

In addition, the Medical Staff Administrative Committee had knowledge



of a third charge against Dr. Yashon that had been the subject of a previous disciplinary hearing. On May 31, 1980, Dr. Carey had notified Dr. Yashon that, because of the events surrounding the Brumfield incident,³⁰ he was suspending his admission and operating room privileges. Dr. Yashon appealed this decision to the Executive Committee of the Medical Staff of University Hospitals. On June 26, 1980, Dr. Cramblett notified Dr. Yashon that he had received the written report of the findings and decision of the Executive Committee;³¹ he advised Dr. Yashon that

[t]his letter constitutes your official notice, . . . , of my acceptance of the decision of the Executive Committee. Thus, you are hereby notified that the summary suspension of your admission and operating room privileges invoked May 31, 1980 is no longer effective,



and that your privileges are hereby reinstated.

See Yashon II, Exhibits 23, 24, 25, appended to Dr. Yashon's affidavit in support of plaintiff's motion for preliminary injunction.

Finally, the Medical Staff Administrative Committee had notice in the record before it that other charges by Dr. Hunt against Dr. Yashon had been reviewed by a committee of four doctors. In its letter of March 13, 1979, the committee, composed of four doctors (three members and one alternate) reported to Dr. Carey that it had considered two charges, one of which was that Dr. Yashon had engaged in "improper and presumably illegal conduct" by removing a note written by Dr. Hunt from a patient's chart. App. C at 3(C)(4). As to this charge, the

committee noted that "[w]e do believe this is improper conduct, i.e. the removal of a note from the patient record, but do not feel that we are in any position to rule on the legality of this matter." Id. Apart from the report of this committee, there is no indication in the record as to whether any further action was taken as to these charges by Dr. Hunt.³²

4. Decision of the Committee

After the conclusion of the hearing, the members of the Medical Staff Administrative Committee deliberated. The minutes of the meeting state:

The open hearing adjourned at approximately 5:30 p.m. At 5:45 p.m., members of the Committee reconvened to deliberate and vote on the



issue before the Committee. Dr. Carey, although a member of the Committee, was not present during the deliberations and voting. Dr. Tzagournis and Dr. Yashon also were not present. The deliberations and voting were not recorded by the court reporter. After discussion among the members present, a motion was made and seconded that Dr. Yashon not be reappointed to the Attending Staff of The Ohio State University Hospitals. Voting was done by secret ballot. As Chairman of the Committee, Dr. Whitcomb did not vote. The votes were counted by two members of the Committee. The Committee members voted 13 to 4 in support of the motion, and thus, voted to reject Dr. Yashon's request for reappointment to the Attending Staff of The Ohio State University Hospitals.

App. B, Attachment IV to the September 3, 1981 letter of Dr. Whitcomb. Though the decision of the committee was clear, the minutes do not reflect any specific findings of the committee as to any of the charges in Dr. Carey's



August 14, 1981 letter to Dr.
Tzagournis.

5. Administrative Rules Governing
University Hospitals

Essential to an understanding of the due process questions raised by Dr. Yashon is a review of the administrative structure of University Hospitals and of the bylaws that have been approved by the Board of Trustees of the Ohio State University [hereinafter Board of Trustees].

Dr. Yashon's counsel has filed an affidavit in which he explains:

On November 30, 1979, the Board of Trustees of The Ohio State University, by amending Section 3335-1-03 of the Ohio Administrative Code, created the University Hospitals Board; the function of said University Hospitals Board is to govern The Ohio State University Hospitals,



including appointments and reappointments to the medical staff. Attached hereto is a true and complete copy of the bylaws of the University Hospitals Board of The Ohio State University, which bylaws comprise Chapters 3335-93 through 3335-103 of the Ohio Administrative Code. Bylaws of the said University Hospitals Board were first approved by a resolution of the Board of Trustees of The Ohio State University adopted on May 2, 1980.

Janata Affidavit at ¶7.

Since May 2, 1981, when the Board of Trustees approved the bylaws of the University Hospitals Board, the University Hospitals Board has been vested with the responsibility for "[a]pproval of medical and dental appointments, clinical privileges, and disciplinary actions upon the recommendation of the appropriate official, subject where required to



final action of the Ohio State University board of trustees." Section 3335-93-02(F) of the Ohio Administrative Code.³³ In making its determination as to whether to appoint a particular physician to the attending medical staff, the University Hospitals Board can rely on the recommendations of two committees established under its bylaws, that is, the Joint Conference Committee and the Medical Staff Administrative Committee.³⁴

The bylaws of the University Hospitals Board delineate the minimal requirements for membership on the attending medical staff as well as the duration of an appointment to the medical staff:

Upon recommendation of the medical staff and in accordance with the medical staff bylaws, the board may appoint faculty members who



are graduates of recognized medical and dental schools, meeting the qualifications prescribed in the medical staff bylaws, to membership on the medical staff of the hospitals and shall grant clinical privileges to such persons, subject to ratification of the Ohio State University Board of Trustees. Appointment to the medical staff carries with it full responsibility for the treatment of individual hospital patients subject to such limitations as may be imposed by the board or the bylaws, rules, and regulations of the medical staff. Appointments to the medical staff shall be for one year, renewable each year in accordance with the reappointment procedure set forth in the medical staff bylaws. Reappointments to the medical staff will be made annually by the board, and shall be for one year.

Section 3335-101-05 of the Ohio Administrative Code [emphasis added]. Thus, it is clear that an appointment or reappointment to the attending medical staff is for one year; these



bylaws do not provide for any automatic reappointment to the attending medical staff. The language of this section, moreover, is permissive; that is, there is no requirement that the University Hospitals Board appoint (or reappoint) a physician to the attending medical staff despite the fact that he meets the minimal requirements of Section 3335-101-05 and any qualifications prescribed in the bylaws of the medical staff.

The Court's resolution of the pending case is rendered more difficult by the fact that, to date, neither the University Hospitals Board nor the Board of Trustees has approved bylaws for the medical staff of University Hospitals, Janata Affidavit at ¶8, despite the fact that such approval is mandated by Section 3335-101-04 of the



Ohio Administrative Code.³⁵ Thus, absent any approved bylaws of the medical staff, the only rules governing qualifications for membership on and appointment (and reappointment) to the attending medical staff are those contained in Section 3335-101-05.³⁶

Finally, the bylaws of the University Hospitals Board seek to define the relationship between University Hospitals and the health sciences, academic and research programs of The Ohio State University:

The health sciences colleges of the university carry out a significant portion of their educational and research activity in university hospitals. Although the board has not been delegated specific responsibilities for academic programs, it shall lend its best efforts to assure that the programs of the health sciences colleges are effectively supported in collaboration with the hospitals patient care

programs. The vice president for health sciences shall be charged with maintaining an effective liaison between the health sciences colleges and the hospitals board to assure excellence in both academic and patient care programs.

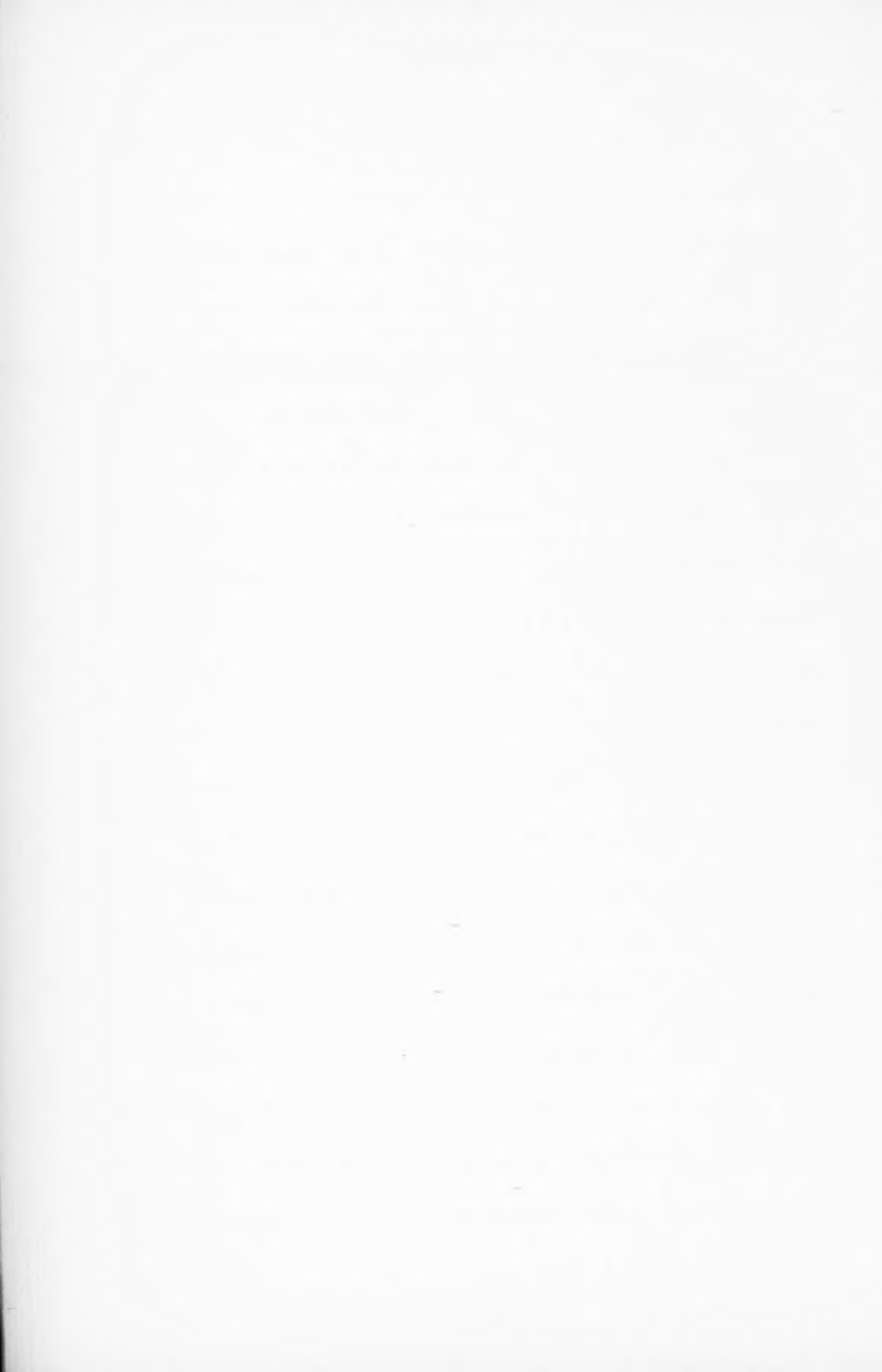
Section 3335-99-01 of the Ohio Administrative Code [emphasis added]. These bylaws, at least, make clear that the University Hospitals Board does not have any "specific responsibilities" for academic programs at The Ohio State University, including those of the College of Medicine.

C.

The defendants have now moved the Court to vacate the consent order, insofar as it provided for Dr. Yashon's continued membership on the attending medical staff at University Hospitals,

and for summary judgment on Dr. Yashon's claims in the complaint. The defendants believe that the September 1, 1981 hearing of the Medical Staff Administrative Committee afforded Dr. Yashon all of the procedural due process to which he was entitled; they urge the Court, therefore, to vacate the consent order and to grant summary judgment, thus allowing to stand the decision of the Medical Staff Administrative Committee not to reappoint Dr. Yashon to the attending medical staff of University Hospitals.

Dr. Yashon has filed a memorandum contra in which he urges the Court to deny the defendants' motion for a number of reasons. Dr. Yashon argues (1) that the principles of res judicata and collateral estoppel preclude the defendants from denying his application

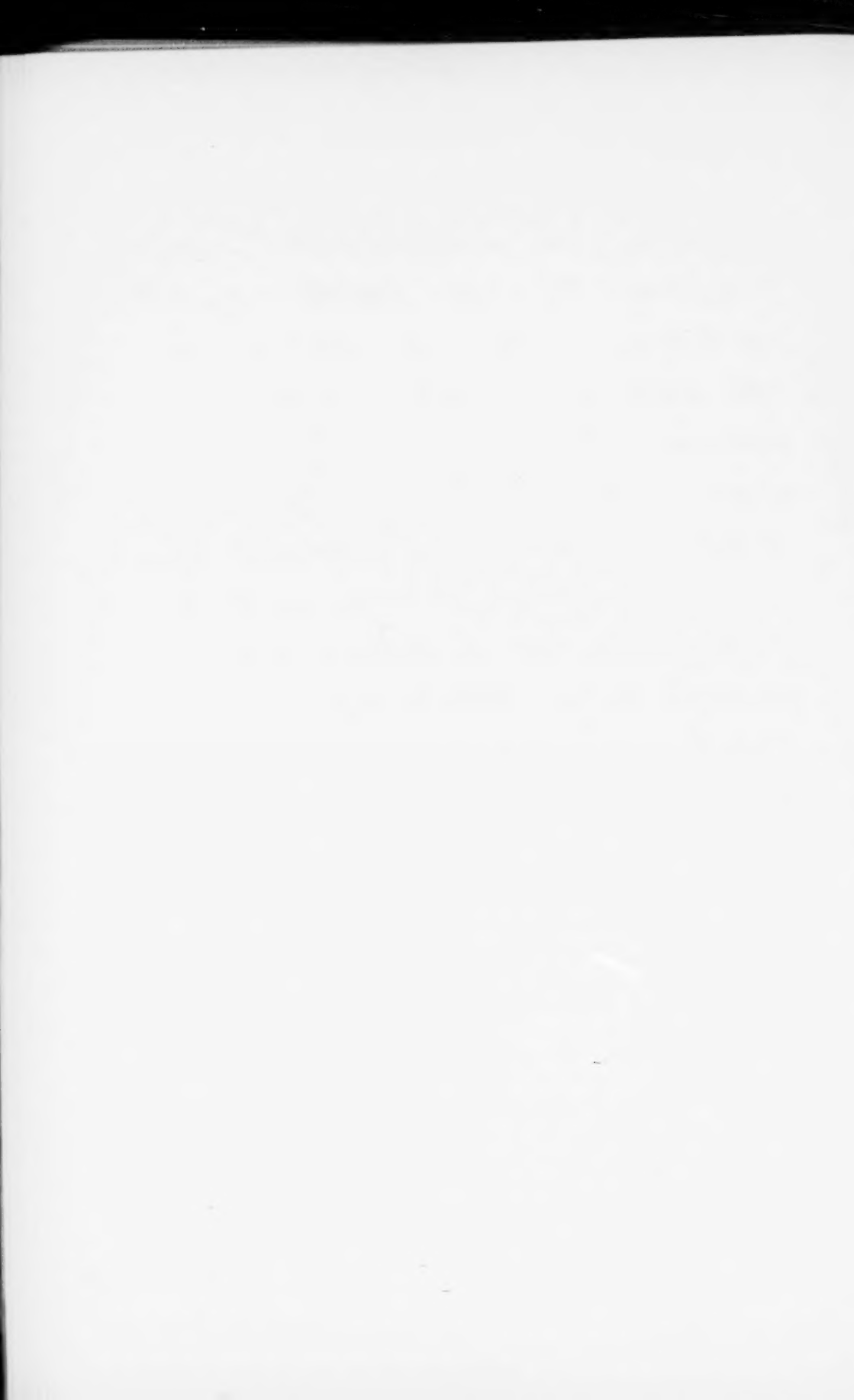


for reappointment because of matters that were the subject of prior disciplinary proceedings; that the format of the Medical Staff Administrative Committee hearing did not comply with this Court's instructions; that the hearing violated his rights to substantive and procedural due process; that the defendants have failed to comply with the bylaws of the University Hospitals Board; and that there are genuine disputes as to material facts which renders summary judgment inappropriate. The Court will now direct its attention to each of these matters.

1. Res Judicata and Collateral Estoppel

As the Court has previously

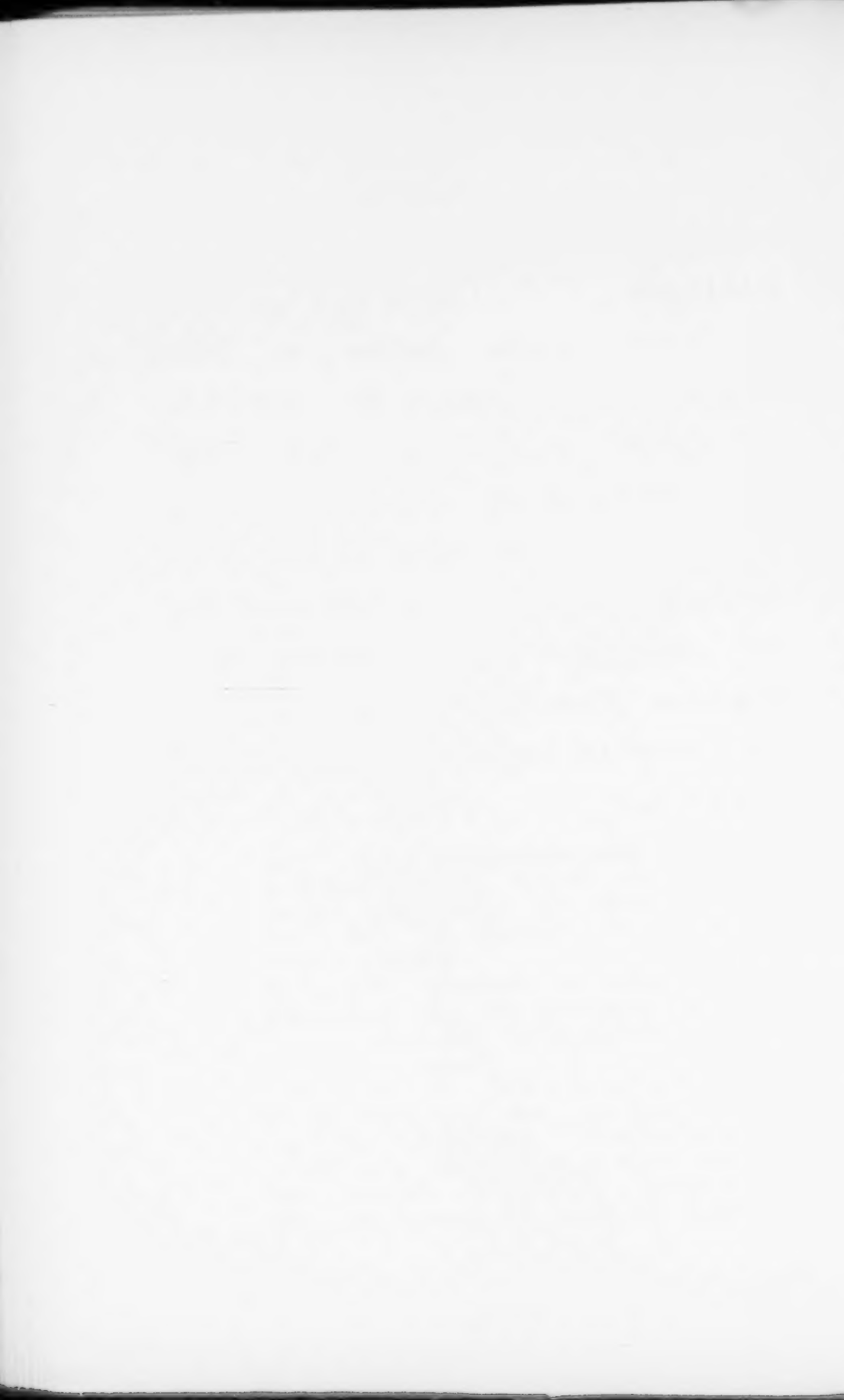
explained, the charges that were considered by the Medical Staff Administrative Committee included some that were specifically considered by previous disciplinary hearings. The prior disciplinary hearings had considered the charges delineated in Dr. Carey's October 27, 1979 letter to Dr. Cramblett and the matters that had resulted in Dr. Carey's May 31, 1980 summary suspension of Dr. Yashon's admission and operating room privileges. The first of these disciplinary proceedings had not resulted in the curtailment or termination of Dr. Yashon's privileges as a member of the attending medical staff at University Hospitals; similarly, the second disciplinary hearing resulted in a finding that there was not sufficient cause for Dr.



Carey's summary suspension of Dr. Yashon's admission and operating room privileges.

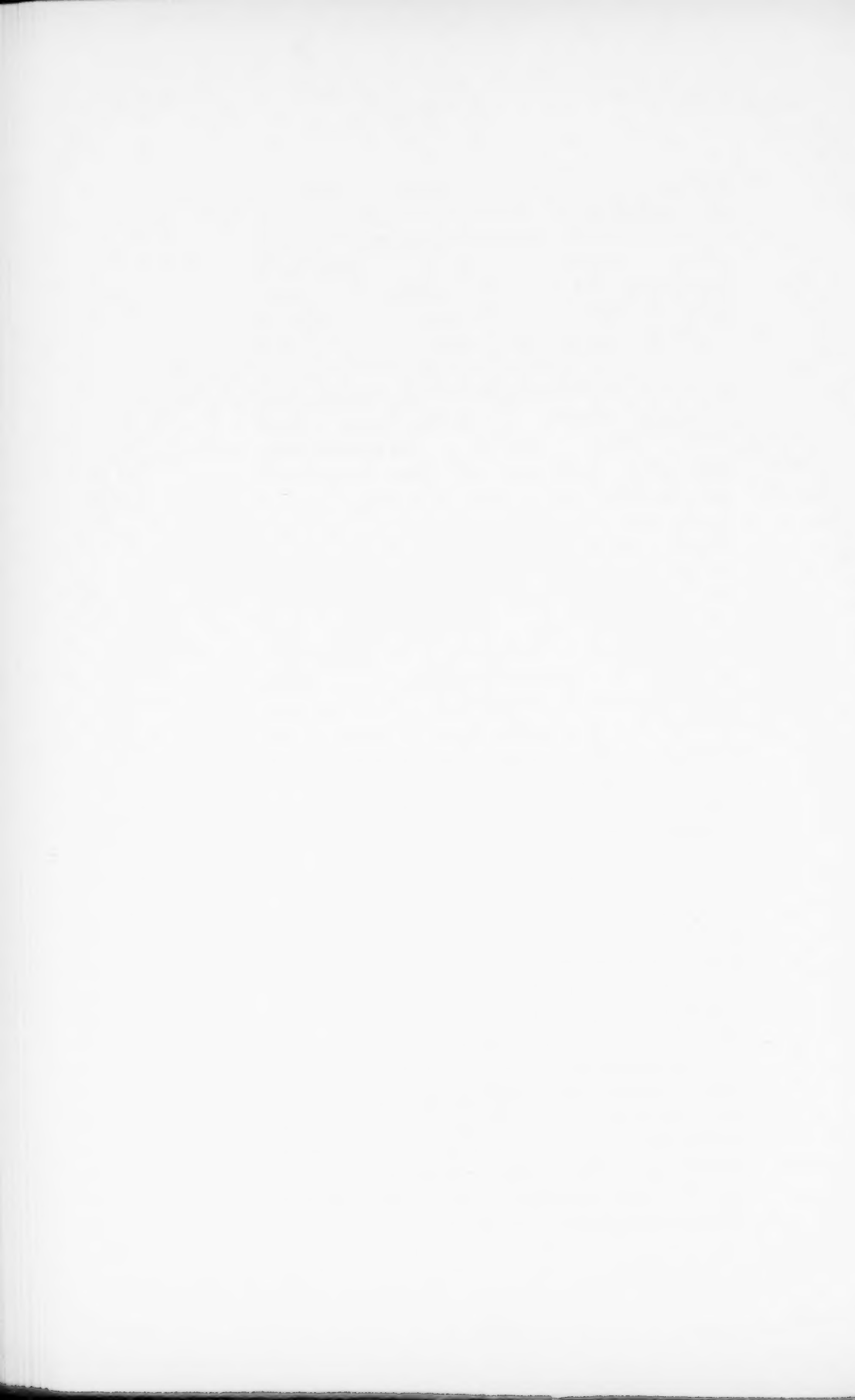
Citing United States v. Utah Construction and Mining Co., 384 U.S. 394 (1966), Dr. Yashon contends that the principles of res judicata and collateral estoppel apply to the prior disciplinary proceedings and precluded the Medical Staff Administrative Committee from considering the facts that were the subject of these prior proceedings:

The consideration by the Medical Staff Administrative Committee of incidents which were the bases of the two prior disciplinary proceedings clearly violated the doctrine of res judicata and collateral estoppel. In both of these prior proceedings and in the 1981 proceeding the parties were identical: defendant Carey, who was prosecuting plaintiff Yashon, plaintiff Yashon and the College of Medicine. In



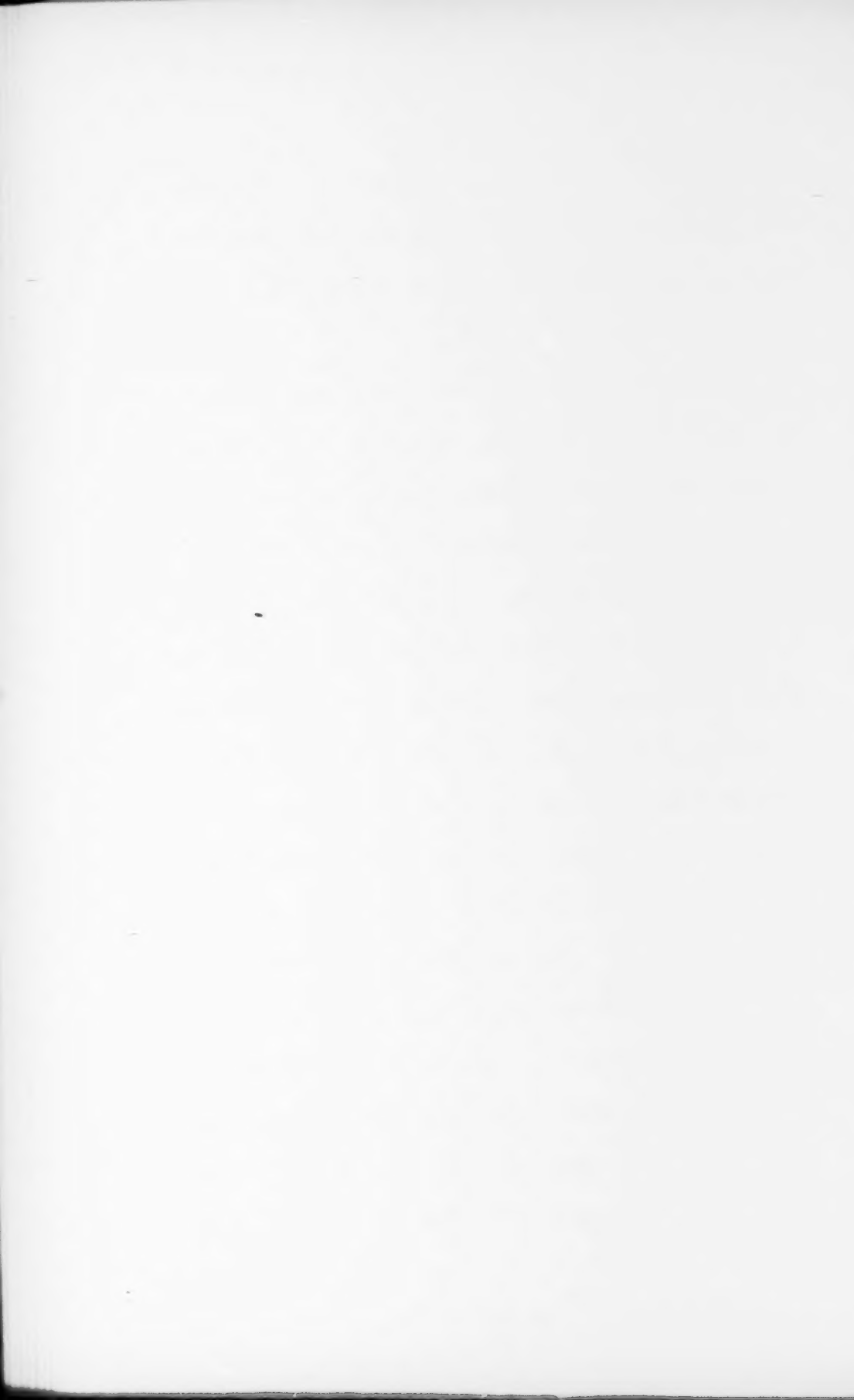
both of these prior proceedings and in the 1981 proceeding the issues were the same: did certain incidents occur, and if so, did those incidents justify a curtailment or suspension of plaintiff Yashon's medical staff privileges. In both of those prior proceedings and in the 1981 proceeding various bodies of the College of Medicine were acting in a judicial capacity. [Citation omitted.] Because both prior disciplinary proceedings terminated without a reduction or suspension of plaintiff Yashon's medical staff privileges, the incidents litigated in those prior proceedings may no longer be used by defendant Carey and the College of Medicine to strip plaintiff Yashon of such privileges.

The Medical Staff Administrative Committee in effect reheard the two prior disciplinary proceedings. The principle of finality of administrative decisions, which principle is represented by the twin doctrines of res judicata and collateral estoppel, bars defendants from again considering the facts which were the subject of the prior proceedings. * * *



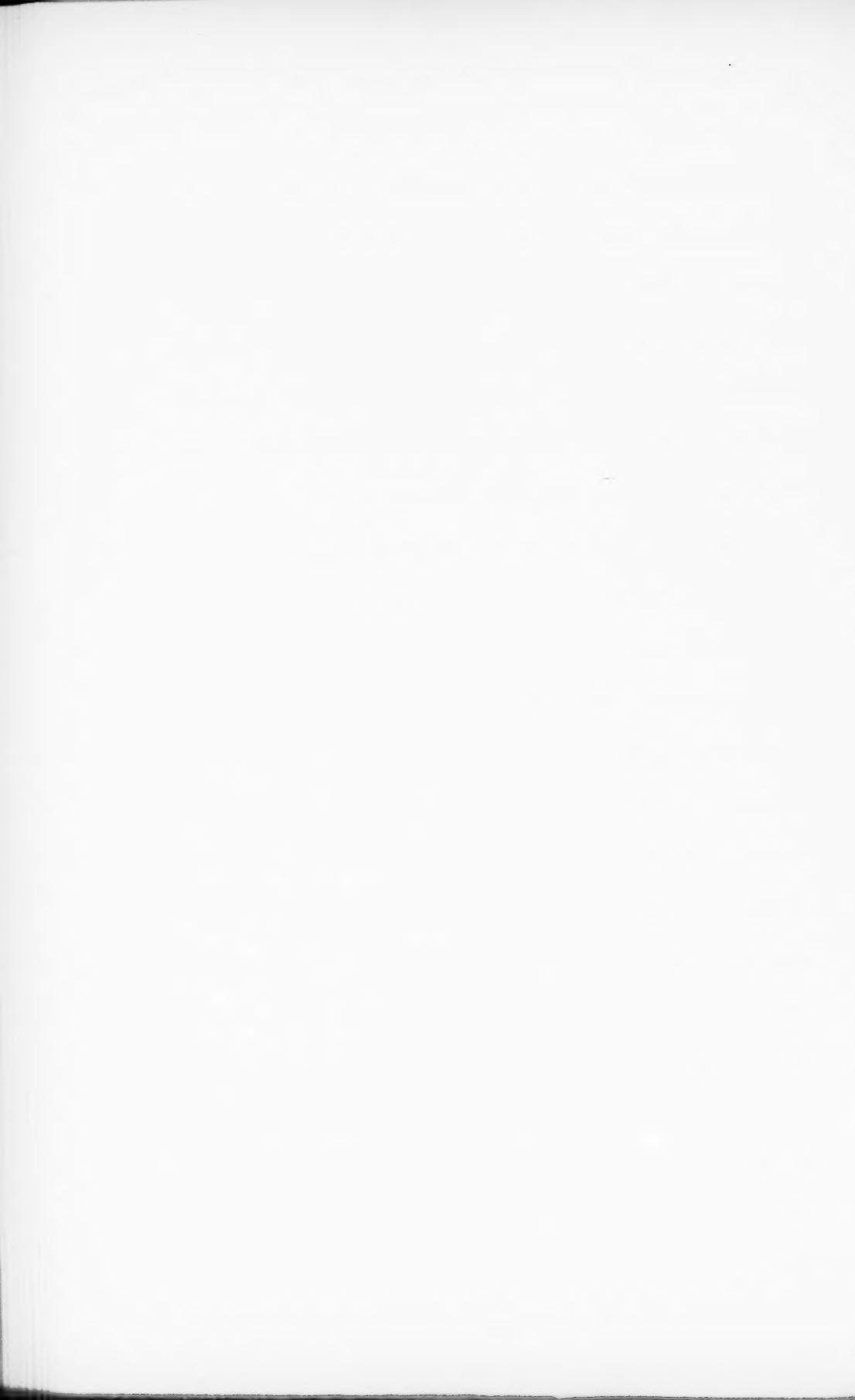
Plaintiff David Yashon, M.D.'s
Memorandum in Opposition to Defendants'
Motion to Vacate Consent Order and for
Summary Judgment at 15. -

As an initial matter, the Court
notes that United States v. Utah
Construction and Mining Co., supra, and
the other cases cited by Dr. Yashon,
Pettus v. American Airlines, Inc., 587
F.2d 627 (4th Cir. 1978); A. Duda &
Sons Cooperative Assn. v. United
States, 495 F.2d 193 (5th Cir. 1974);
International Wire v. Local 38,
International Brotherhood of Electrical
Workers, 475 F.2d 1078 (6th Cir. 1973),
all involved the question of whether
"judicial proceedings may be precluded
by administrative decision." Wright,
Miller & Cooper, Federal Practice and
Procedure: Jurisdiction §4475 at
764-65 [emphasis added]. This is



fundamentally different from the question posed by the facts in this case, that is, whether the principles of res judicata and collateral estoppel apply to successive proceedings before different administrative groups at University Hospitals.

Based upon the record before it, the Court is of the opinion that the principles of res judicata and collateral estoppel did not bar the Medical Staff Administrative Committee from considering charges that had previously been considered by other disciplinary bodies. This determination rests upon a number of factors. First, the question presented at the prior disciplinary hearings, that is, whether Dr. Yashon should be dismissed from the attending medical staff for disciplinary reasons, differs



from that presented to the Medical Staff Administrative Committee, that is, whether Dr. Yashon should be reappointed, for the year beginning July 1, 1981, to the attending medical staff. See Shulman v. Washington Hospital Center, 319 F.Supp. 252, 254 (D. D.C. 1970).³⁷ Secondly, as to the charges in Dr. Carey's October 27, 1979 letter to Dr. Cramblett, the record demonstrates that these charges were not fully litigated; a full consideration by the Executive Committee of these charges and of the reprimand by Dr. Tzagournis was precluded by Dr. Yashon's abandonment of his appeal.³⁸ Finally, some of the charges considered by the Medical Staff Administrative Committee were not the subject of the two prior disciplinary proceedings referred to by Dr. Yashon.



See, e.g., App. B, Attachment III (charges 2(a), 3, 5), though two of these charges (charges 2(a) and 5) were the subject of prior disciplinary not referred to by Dr. Yashon.

This conclusion, that the Medical Staff Administrative Committee was permitted to hear certain charges against Dr. Yashon despite the fact that these charges were the subject of prior disciplinary proceedings, is, the Court believes, in accord with the law of the State of Ohio. In a number of decisions dealing with the principles of res judicata and collateral estoppel, the Ohio Supreme Court has cited with approval the Restatement of the Law, Judgments, Whitehead v. General Telephone Co., 20 Ohio St.2d 108, 112, 114 (1969); Trautwein v. Sorgenfrei, 58 Ohio St.2d 493, 495



(1975); City of Columbus v. Union Cemetery Assn., 45 Ohio St.2d 47, 51 (1976), as well as the tentative drafts of the Restatement of the Law 2d, Judgments. Hicks v. De La Cruz, 52 Ohio St.2d 71, 74 (1977).

Section 131 of the Restatement of the Law 2d, Judgements (Tent. Draft No. 7 [1980]) at 30, provides that

- (1) Except as stated in subsections (2), (3), and (4), a valid and final adjudication by an administrative tribunal has the same effects under the rules of res judicata, subject to the same exceptions and qualifications, as a judgment of a court.

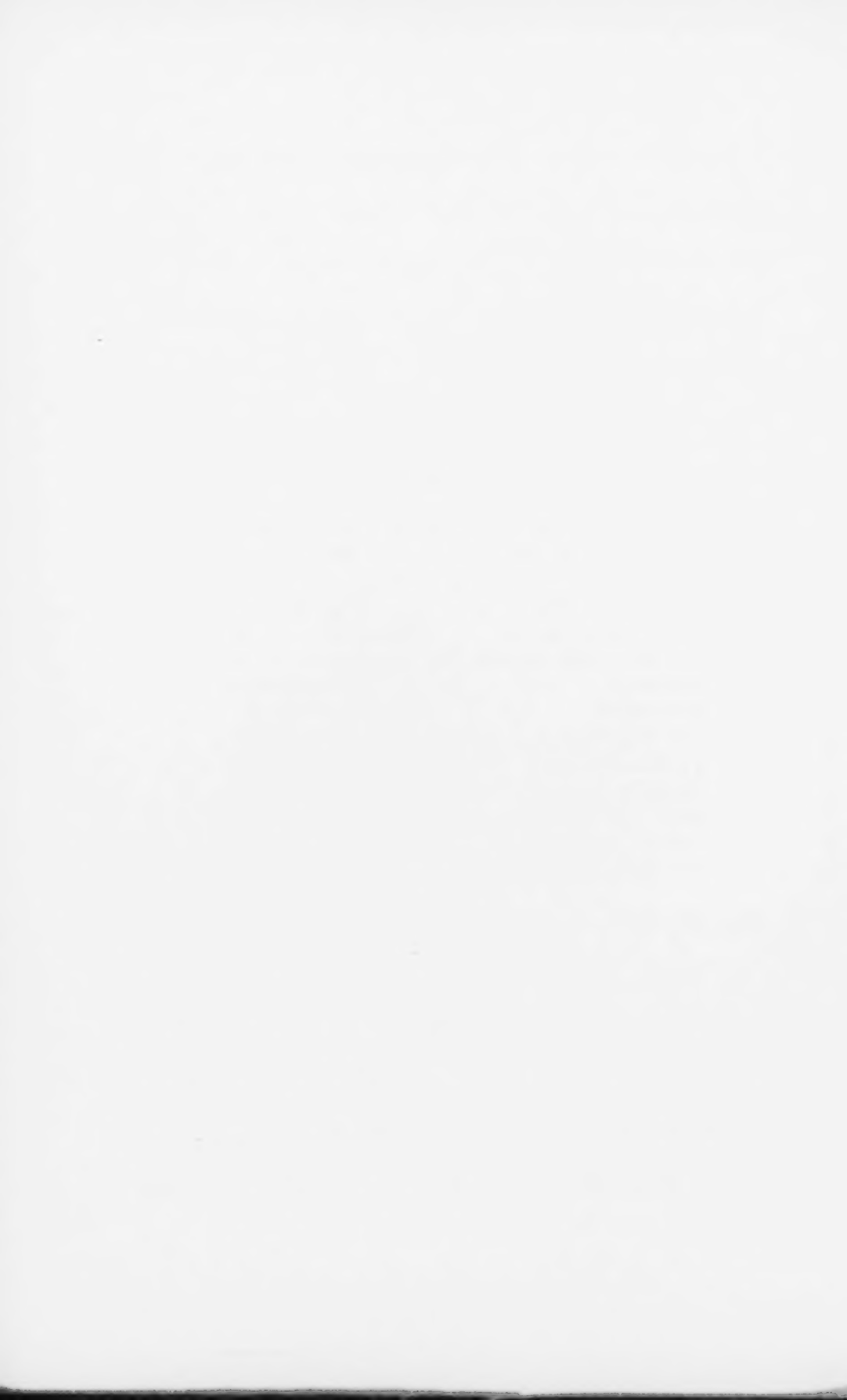
Comment a explains that this rule "applies when a final determination by an administrative tribunal is invoked as the basis of claim or issue preclusion in a subsequent action,

whether that subsequent action is another proceeding in the same administrative tribunal or is a proceeding in some other administrative or judicial tribunal." Id. at 32. And comment b further delineates the situations to which section 131 applies:

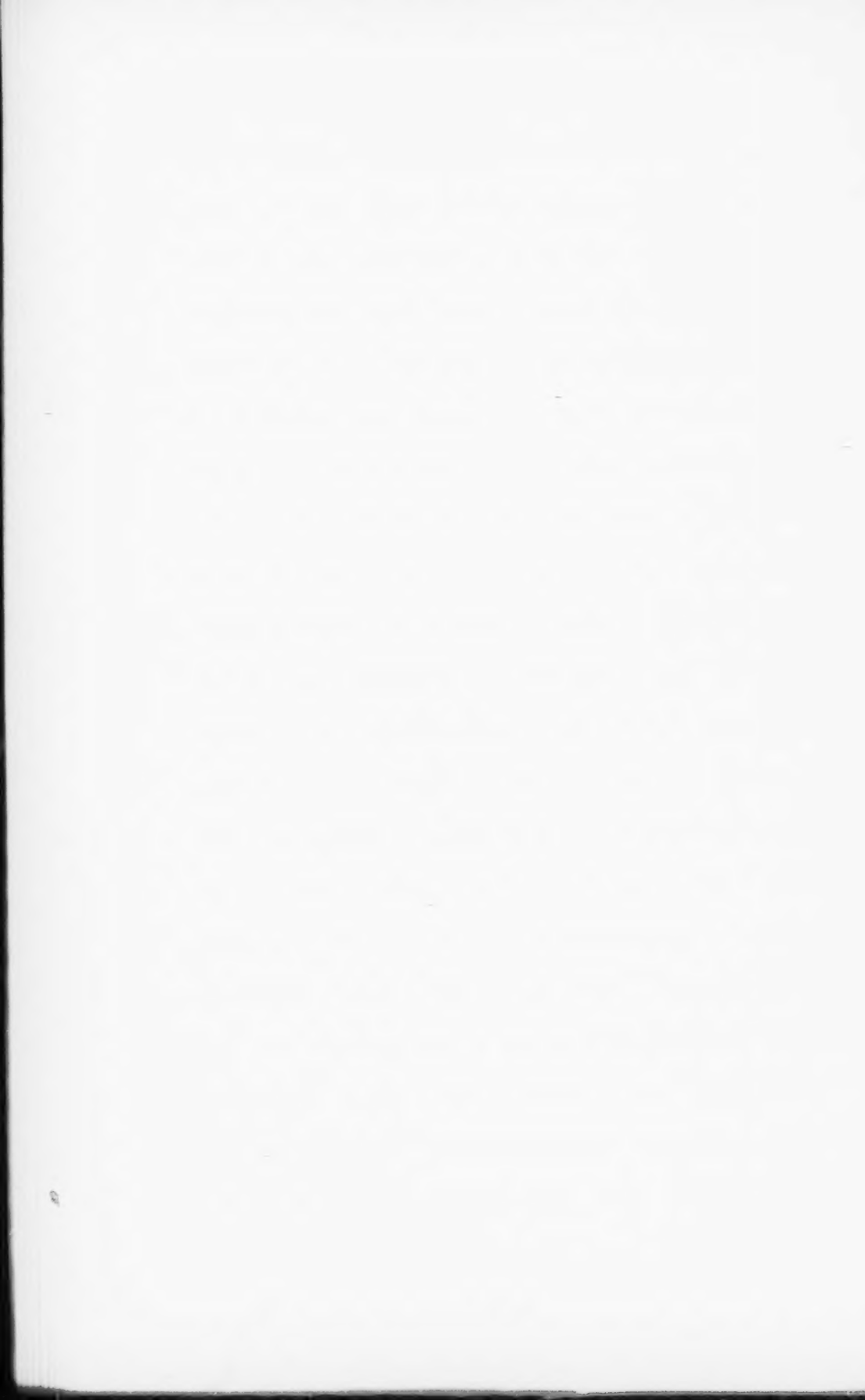
Where an administrative agency is engaged in deciding specific legal claims or issues through a procedure substantially similar to those employed by courts, the agency is in substance engaged in adjudication. Decisional processes using procedures whose formality approximates those of courts may properly be accorded the conclusiveness that attaches to judicial judgments.

Id. at 33.

Even were the Court to hold that Drs. Tzagournis and Cramblett were acting in adjudicative capacities when they acted on the recommendations of the grievance committee and of the



Executive Committee, respectively, section 131 would still not be of any help to Dr. Yashon. As the Court has previously pointed out, the defendants can rightfully apply different standards to the question of whether a physician's hospital privileges, once granted, should be revoked and the question of whether a physician's application for annual appointment should be denied. Therefore, with respect to the September 1, 1981 hearing of the Medical Staff Administrative Committee, section 131 does not mandate the application of claim preclusion. As to issue preclusion, section 131 may mandate that preclusive effect be given to the findings of fact in the earlier disciplinary proceedings, see comment b, id. at 36; but both the September

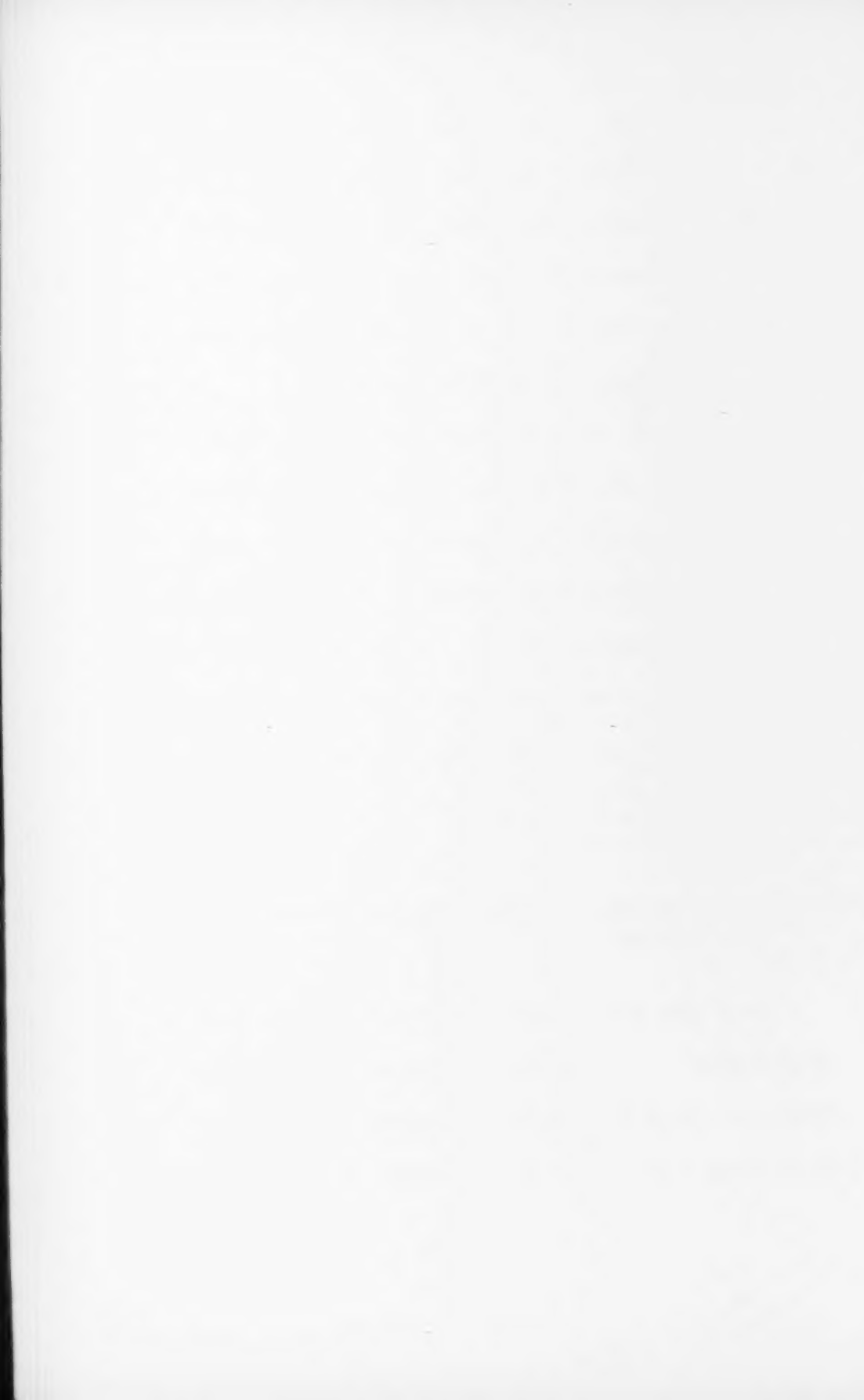


30, 1980 letter of Dr. Tzagournis to Dr. Yashon and the June 26, 1980 letter of Dr. Cramblett fail to include any findings of fact as to which preclusive effect can appropriately be given.

For the above reasons, the Court finds that Dr. Yashon's argument that the principles of res judicata and collateral estoppel barred the Medical Staff Administrative Committee from considering charges evaluated by prior disciplinary proceedings to be without merit.

2. Failure to Comply with the Court's Directives

Dr. Yashon also contends that the September 1, 1981 hearing of the Medical Staff Administrative Committee did not comply with the directives



given by the Court to counsel for the parties on July 17, 1981. Accepting as true the assertions in the Janata Affidavit, it is clear that the Court did not

suggest, indicate or order that the Medical Staff Administrative Committee conduct a "due process" hearing on plaintiff Yashon's application for reappointment to the medical staff, at which hearing witnesses could be called and examined. Instead, [the Court] suggested that plaintiff Yashon and defendant Carey each make a presentation to the Medical Staff Administrative Committee concerning plaintiff Yashon's application for reappointment to the medical staff.

Janata Affidavit at ¶13. It is also clear that the Court did not enter an order precluding Dr. Carey from calling witnesses at the September 1, 1981 hearing.



Even if the Court were of the opinion that the defendants failed to comply with the Court's "suggestions," Dr. Yashon cites no authority for the proposition that this failure, in and of itself, would justify the Court's disregard of the decision of the Medical Staff Administrative Committee. If the procedures employed by the Medical Staff Administrative Committee did not otherwise deprive Dr. Yashon of his constitutional rights,³⁹ a question the Court has yet to examine, the defendants' failure to comply with the Court's "suggestions" would not render the September 1, 1981 hearing unconstitutional. Cf. United States v. Caceres, 440 U.S. 741 (1979).



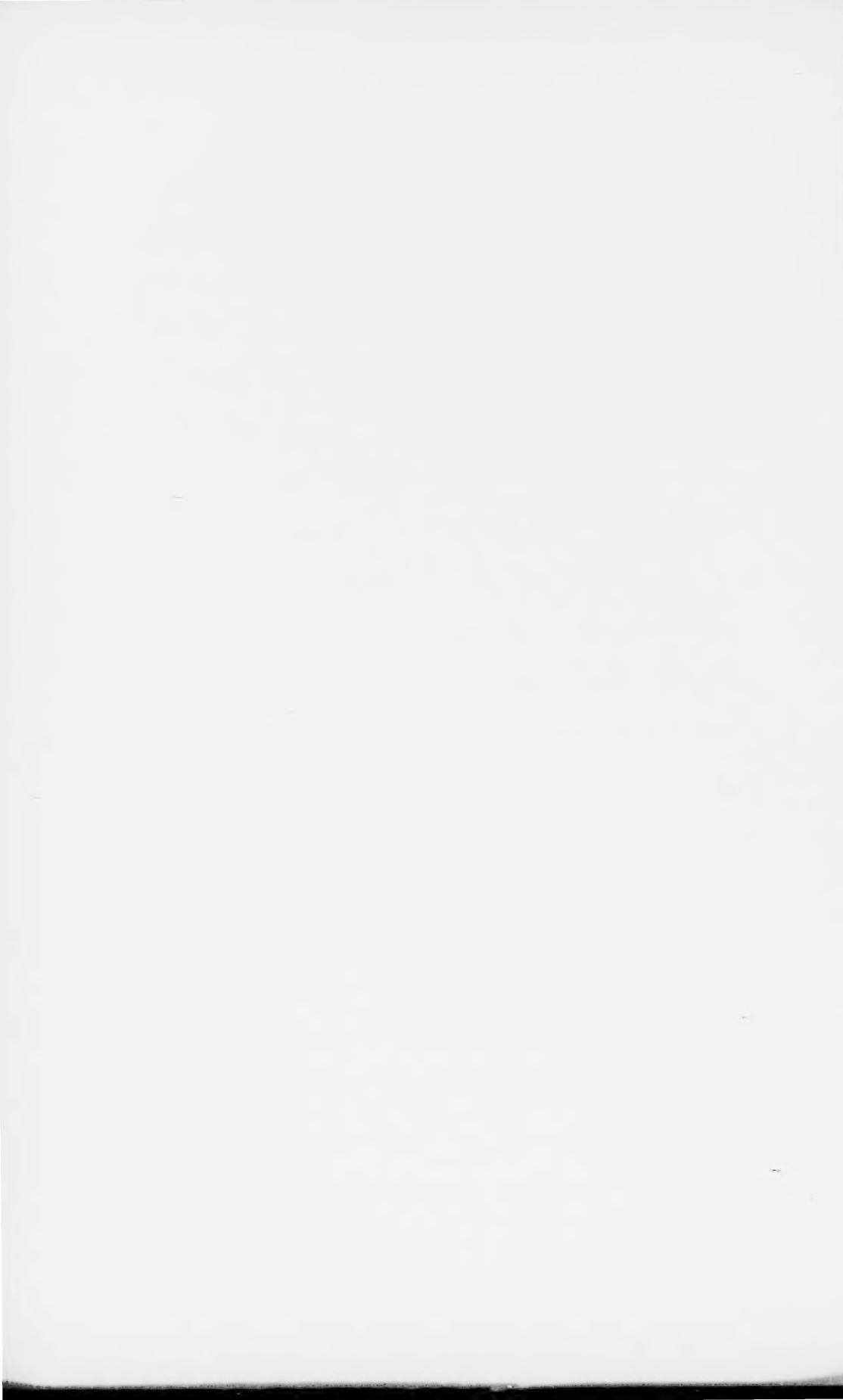
3. Substantive and Procedural Due Process

Dr. Yashon has proffered a number of arguments to support his view that the September 1, 1981 hearing of the Medical Staff Administrative Committee did not accord him substantive and procedural due process as required by the Fourteenth Amendment to the Constitution. Assuming that Dr. Yashon did, in fact, have a liberty or property interest pursuant to which the defendants were obliged to comply with the mandates of the Fourteenth Amendment, the Court will first address these arguments.

At the hearing of the Medical Staff Administrative Committee, Dr. Carey explained that he would present testimony and documentary evidence to



support his charges that Dr. Yashon had engaged in conduct that rendered him unfit to be reappointed to the attending medical staff of a teaching hospital. As the Court has previously explained, there was testimony at the hearing as to certain charges (1(e); 2(c); 2(d); 5) which Dr. Yashon either did not deny or as to which Dr. Yashon acknowledged that he had engaged in the conduct but denied that the conduct itself was improper. As to a number of other charges (1(d); 2(a); 3; 9; 13), there was sufficient evidence based upon which the Medical Staff Administrative Committee could find that the charges were meritorious. Finally, there were a number of charges (1(c); 1(f); 8; 14) as to which sufficient evidence was presented to support a finding that the charges were



meritorious; at the same time, the nature of these charges were such that, had Dr. Yashon been given the opportunity, he may have been able to present rebuttal testimony or to lessen the seriousness of the alleged charges.

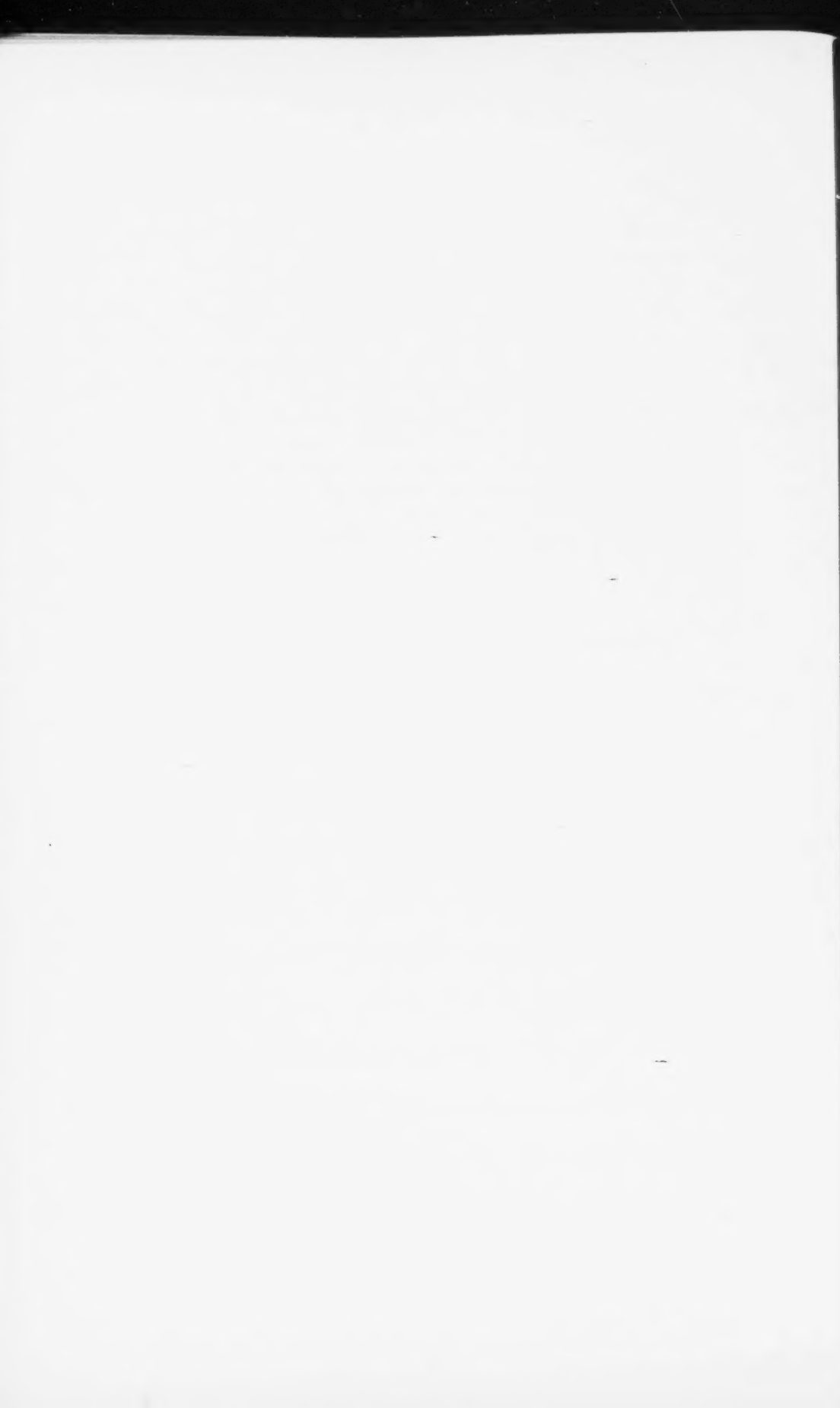
In determining whether there was sufficient evidence before the Medical Staff Administrative Committee to support the above charges, the Court will not consider the charges de novo and will not "substitute its own judgment for that of the experts who sat in judgment on plaintiff's qualifications to continue to practice surgery." Klinge v. Lutheran Charities Association of St. Louis, 523 F.2d 56, 60 (8th Cir. 1975). As explained by the Eighth Circuit,

[w]hile plaintiff was entitled to judicial review of the administrative action

that was finally taken against him, he was not entitled to a trial de novo as to his competency to remain on the staff at Lutheran. The judicial inquiry available to him was limited to a consideration of whether his ultimate removal from the staff involved deprivations of procedural or substantive rights guaranteed by the fourteenth amendment.

Id.

Because of this Court's obvious lack of expertise in deciding whether the allegations of misconduct, if proven, rendered Dr. Yashon unfit to be reappointed to the attending medical staff, "the decision of a hospital's governing body concerning the granting of hospital privileges is to be accorded great deference." Laje v. R. E. Thomason General Hospital, 564 F.2d 1159, 1162 (5th Cir. 1977), cert. denied, 437 U.S. 905 (1978). Such a



view is, this Court believes, in accord with the standards articulated by the Fifth Circuit:

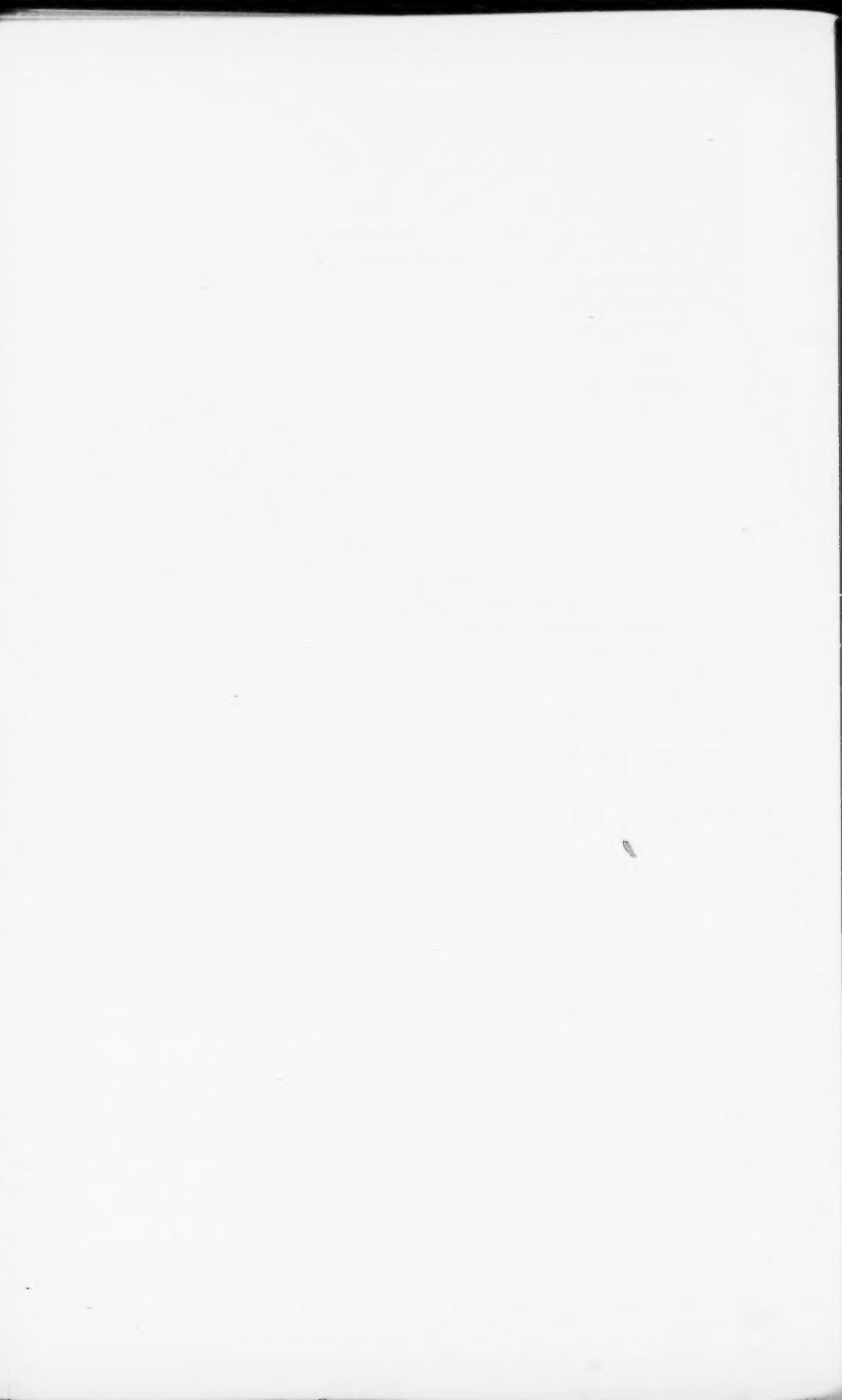
. . . No court should substitute its evaluation of such matters for that of the Hospital Board. It is the Board, not the court, which is charged with the responsibility of providing a competent staff of doctors. The Board has chosen to rely on the advice of its Medical Staff, and the court cannot surrogate for the Staff in executing this responsibility. Human lives are at stake, and the governing board must be given discretion in its selection so that it can have confidence in the competence and moral commitment of its staff. The evaluation of professional proficiency of doctors is best left to the specialized expertise of their peers, subject only to limited judicial surveillance. The court is charged with the narrow responsibility of assuring that the qualifications imposed by the Board are reasonably related to the operation of the hospital and fairly administered. In short, so long as staff



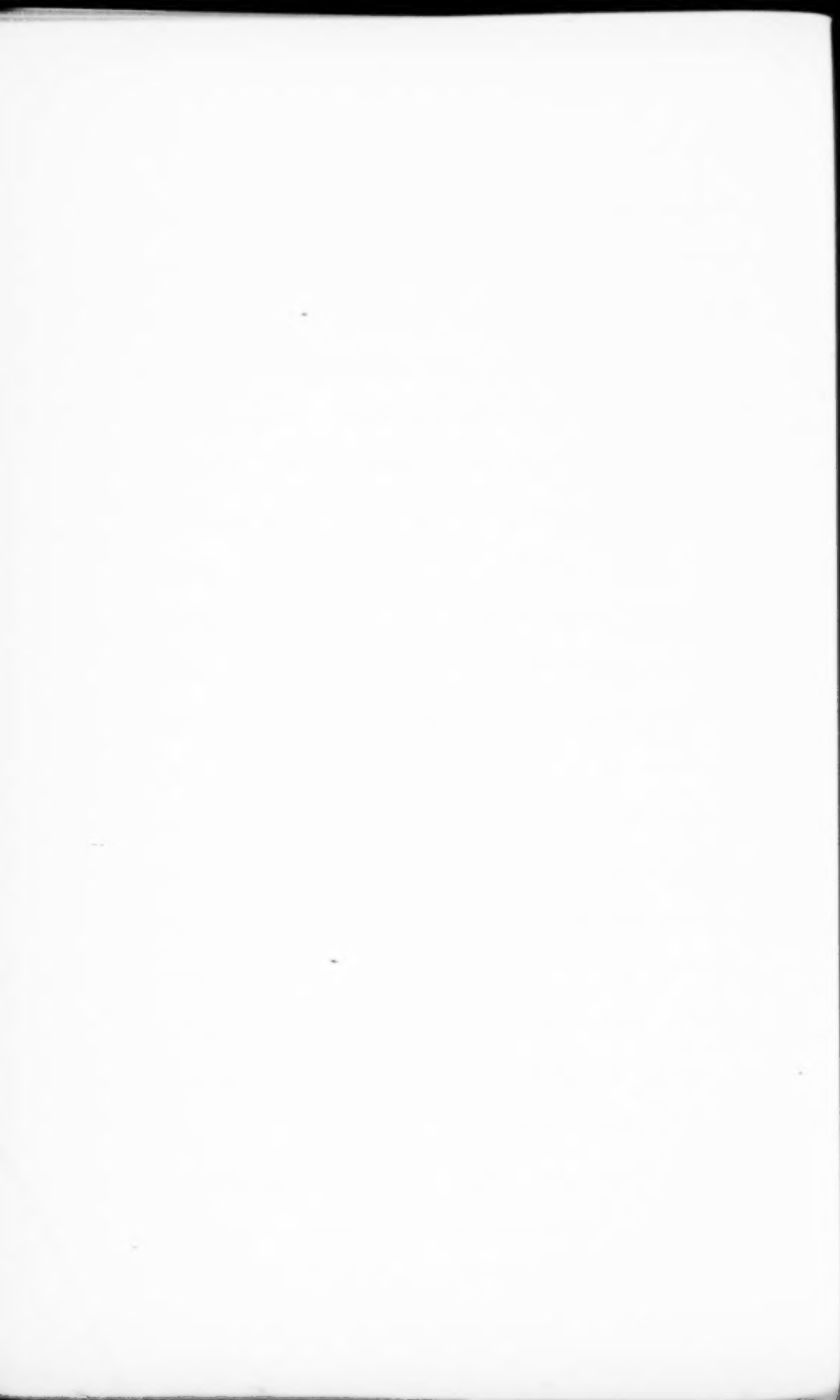
selections are administered with fairness, geared by a rationale compatible with hospital responsibility, and unencumbered with irrelevant considerations, a court should not interfere. Courts must not attempt to take on the escutcheon of Caduceus.

Bosa v. Board of Managers of the Val Verde Memorial Hospital, 437 F.2d 173, 177 (5th Cir. 1971). Accord, Woodbury v. McKinnon, 447 F.2d 839, 845 (5th Cir. 1971); Klinge v. Lutheran Charities Association of St. Louis, *supra*; Lale v. R. E. Thomason General Hospital, *supra*.⁴⁰

In this case, the Medical Staff Administrative Committee was presented with sufficient evidence that could justify both its finding that certain charges against Dr. Yashon were meritorious and its resultant decision that Dr. Yashon should not be



reappointed to the attending medical staff. Despite the fact that the charges did not include allegations that Dr. Yashon was incompetent as a surgeon,⁴¹ the Court will not second guess the implicit conclusion of the Medical Staff Administrative Committee that the charges, if proven, would render a physician unfit for membership on the medical staff. Further, even though the charges considered did not allege any conduct violative of presently promulgated bylaws of the University Hospitals Board or of any other administrative rules governing the conduct of members of the medical staff, the Court cannot, upon a review of the record, conclude the Medical Staff Administrative Committee, in evaluating the charges of misconduct, applied professional and ethical



standards that were not reasonably related to the operation of the teaching hospital. See Sosa v. Board of Managers of the Val Verde Memorial Hospital, 437 F.2d at 176-77; Klinge v. Lutheran Charities Association of St. Louis, *supra*.

In terms of procedural due process, the defendants maintain that Dr. Yashon "was entitled to reasonable notice of the charges against him and a fair opportunity to be heard with respect to those charges before a panel of fair minded doctors. However, he was not entitled to a full blown judicial trial." Klinge v. Lutheran Charities Association of St. Louis, 523 F.2d at 60, citing Duffield v. Charleston Area Medical Center, Inc., 503 F.2d 512 (4th Cir. 1974), affirming 361 F.Supp. 398 (S.D. W.Va. 1973); Christhilf v. The



Annapolis Emergency Hospital Association, Inc., 496 F.2d 174 (4th Cir. 1974); Woodbury v. McKinnon, supra. Dr. Yashon contends that he was not afforded even these minimal due process protections and that, moreover, because of the drastic consequences of defendants' action in denying his application for reappointment, he was entitled to even greater due process rights.

There is no question but that the notice of the time and place of the hearing to consider Dr. Yashon's application for reappointment to the attending medical staff had to be provided sufficiently in advance to permit him to prepare his defense to the charges. Suckle v. Madison General Hospital, 362 F.Supp. 1196 (W.D. Wis. 1973), aff'd on other grounds, 499 F.2d

1364 (7th Cir. 1974); Christhilf v. The Annapolis Emergency Hospital Association, Inc., supra. Further, the charges to be considered at the hearing must be sufficiently specific as to allow a meaningful opportunity to prepare a defense. Poe v. Charlotte Memorial Hospital, Inc., 374 F.Supp. 1302, 1310 (W.D. N.C. 1974); Suckle v. Madison General Hospital, 362 F.Supp. at 1211-1212. Finally, a number of cases have recognized a physician's right to prehearing discovery. Christhilf v. The Annapolis Emergency Hospital Association, Inc., 496 F.2d at 180; Suckle v. Madison General Hospital, 362 F.Supp. at 1212.

Based on the record before it, the Court finds that Dr. Yashon's constitutional objections as to the adequacy of the notice of the time and

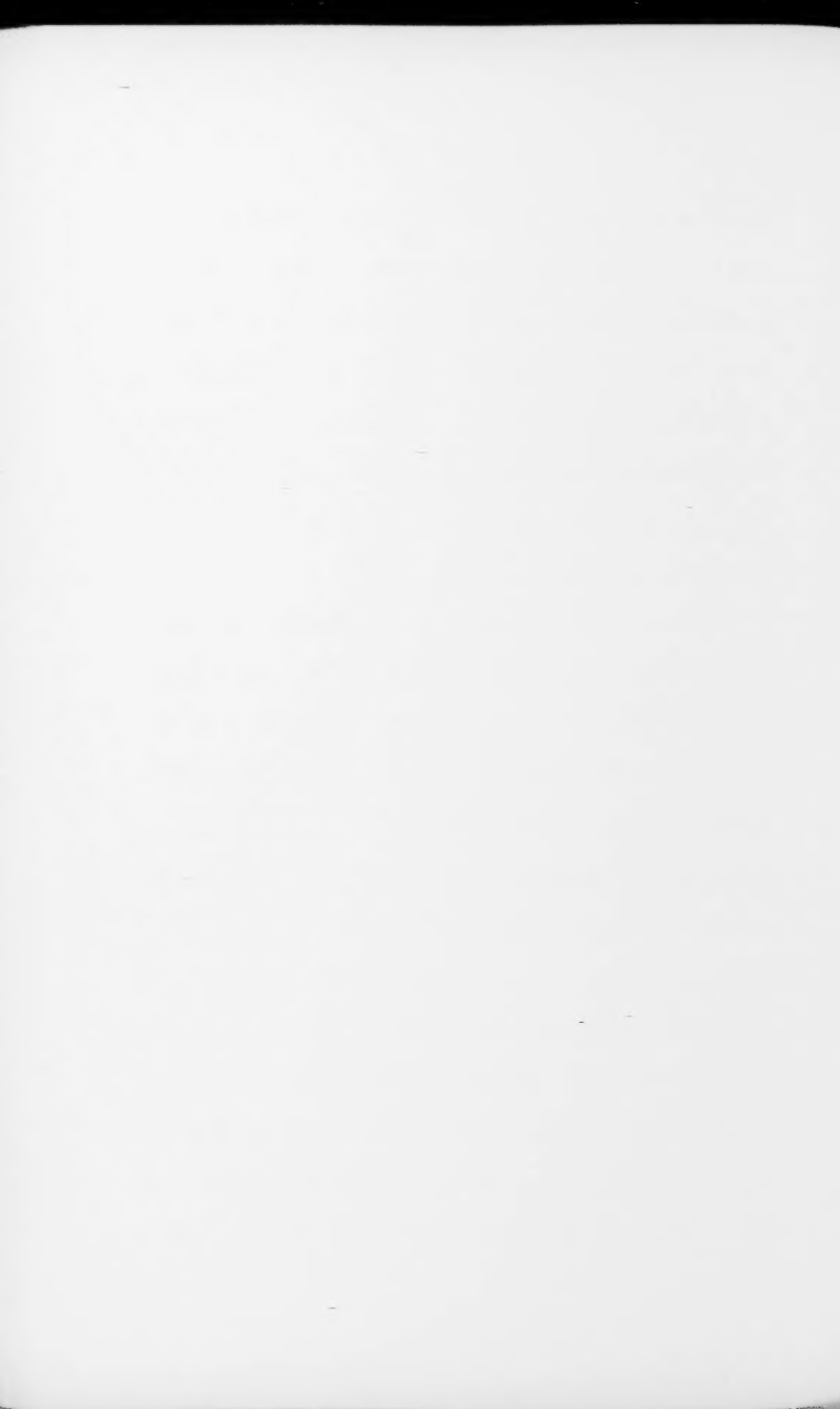


place of the hearing, the specificity of the charges considered by the Medical Staff Administrative Committee, and the failure of the defendants to afford him pre-hearing discovery are without merit. This conclusion rests on a number of factors. Beginning almost three weeks prior to the September 1, 1981 hearing, Dr. Yashon was sent a number of notices concerning the scheduling, format of, and charges to be heard at the hearing before the Medical Staff Administrative Committee. As to the specificity of the charges in Dr. Carey's letter of August 14, 1981 to Dr. Tzagournis, Dr. Yashon himself admits that there are many similarities between these charges and those listed in Dr. Carey's letter of October 27, 1979; Dr. Yashon also expressly admits that most of the



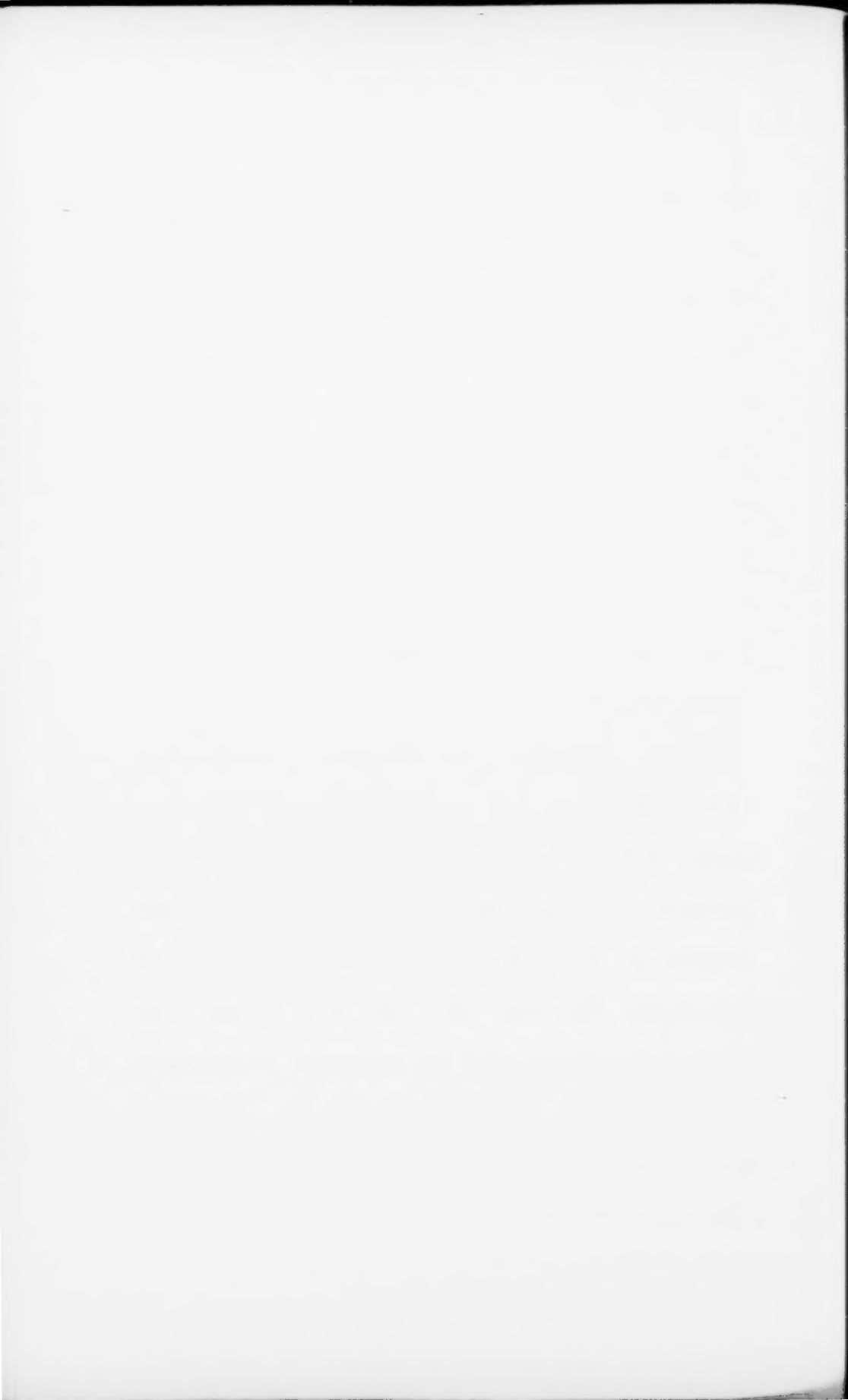
testimony elicited at the September 1, 1981 hearing involved the same incidents that were the subject of the two prior disciplinary proceedings. Plaintiff David Yashon, M.D.'s Memorandum in Opposition to Defendants' Motion to Vacate Consent Order and for Summary Judgment at 14.

The Court has previously noted, moreover, that the charges in the August 14, 1981 letter were very similar to those in Dr. Tzagournis' October 22, 1980 letter to Dr. Yashon and that several of the charges were also the subject of two prior disciplinary proceedings not referred to by Dr. Yashon in his memorandum. In addition, the only documentary evidence presented by Dr. Carey at the September 1, 1981 hearing had been available to Dr. Yashon as part of the scheduled,



but aborted, November 20, 1980 hearing of the Executive Committee. Under these circumstances, Dr. Yashon's prior familiarity with virtually all of the charges and documentary evidence, coupled with his able cross-examination, renders meritless any claim that he was prejudiced by the notice, the content of the charges, or his inability to conduct pre-hearing discovery.⁴²

Dr. Yashon maintains, moreover, that the hearing was constitutionally defective in a number of other respects: he was entitled to the presence and active participation of counsel; he was denied the right to call witnesses and to present evidence; and he was entitled to a written decision from the Medical Staff Administrative Committee detailing its



reasons for denying his application for reappointment and describing the evidence it relied upon in reaching its decision.

In Mathews v. Eldridge, 424 U.S. 319, 335 (1976), the Supreme Court delineated the various factors that must be considered in determining what process is due in a particular case:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Despite the fact that two-thirds of Dr. Yashon's medical practice is conducted at another hospital in the City of

Columbus, App. A at 291, the Court fully recognizes that Dr. Yashon has substantial personal interests in being reappointed to the attending medical staff of University Hospitals; these personal interests include maintaining his income, protecting his professional reputation, and maintaining his participation on the medical staff of a teaching hospital. As to the third factor identified in Mathews v. Eldridge, supra, the Ninth Circuit Court of Appeals has eloquently described a hospital's varied and important interests in quickly resolving problems as to medical staff membership:

The Hospital's interest is somewhat more complex. Like any government agency it has a strong interest in being able to deal quickly and inexpensively with personnel matters in order to promote



efficiency and economy in administration. But because the government agency here is a hospital and plaintiff Stretten is a professional, the employer's interest is more particularized than in the ordinary case. As a hospital the employer has a special interest in protecting its patients from treatment by one who is professionally incompetent. The survival of patients often depends upon the presence of competent physicians. The interest of the hospital in enlarging the prospects of survival of patients weighs in favor of due process procedures which will minimize the risk of the continued employment of an incompetent doctor, so long as these procedures are consistent with notions of fundamental fairness. In a sense this is the reverse side of the Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), coin. In Goldberg the danger of lack of survival was borne by the plaintiff whose rights were terminated while here the risk is borne by the patients entrusted to the defendant's care.

The Hospital's interest is unusual in another respect.

Dr. Stretten is a professional whose position requires that he work in close coordination with other medical personnel. A hospital staff is highly interdependent, both in the sense that one doctor depends upon the professional skill of other doctors and in the sense that the collegial nature of the body makes tolerable working relationships an absolute prerequisite to effective staff performance. The necessity for a healthy working relationship is a function of the nature of the work to be done. Incompatible workers on farms, ranches, or in certain types of factories can function reasonably well although even there it is doubtful that full efficiency is achieved. Effective performance by physicians on the staff of a hospital, whose tasks require a high degree of cooperation, concentration, creativity, and the constant exercise of professional judgment, requires a greater degree of compatibility. The Hospital must recognize this necessity. This enhances its interest in quickly dealing with incompetence and debilitating personal



frictions. In emphasizing the hospital's and thus the state's interest in harmony, we hasten to assert that we are not drawing the line between professions and nonprofessionals for this purpose. In fact, we believe there is no clear line, rather only a continuum along which the state's interest in expeditious settlement of such problems attenuates.

Stretten v. Wadsworth Veterans Hospital, 537 F.2d 361, 368 (9th Cir. 1976) [footnote omitted]. Thus, the only task remaining with respect to the three procedural irregularities claimed by Dr. Yashon is to assess "the risk of an erroneous decision prejudicial to plaintiff under the procedures employed and the probable reduction of error which might result from a more elaborate . . . set of procedures." Id.

As to Dr. Yashon's claim that he was entitled to the presence and active

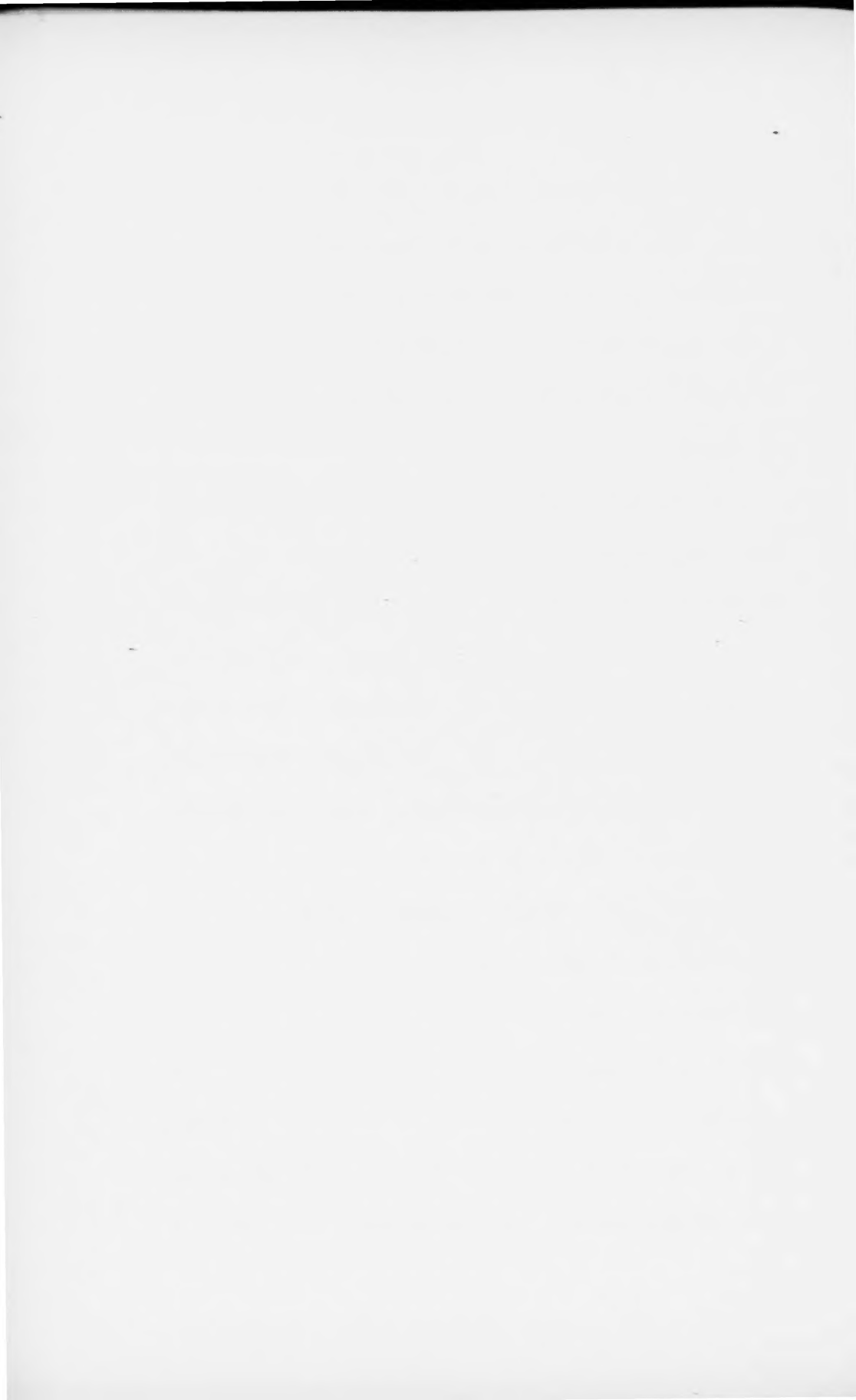


participation of counsel at the September 1, 1981 hearing of the Medical Staff Administrative Committee, the Court cannot say that his desire for the assistance of counsel outweighs the university's interest in avoiding a full fledged trial. Frumkin v. Board of Trustees, Kent State University, 626 F.2d 19 (6th Cir. 1980); Woodbury v. McKinnon, *supra*. But see Garrow v. Elizabeth General Hospital and Dispensary, 79 N.J. 549, 401 A.2d 533, 541-42 (1979); Silver v. Castle Memorial Hospital, 53 Hawaii 475, 497 P.2d 564, 571-72, cert. denied, 409 U.S. 1048 (1972).⁴³ Where, as here, the record shows that Dr. Yashon fully participated at the hearing, that he was conversant with all of the charges made by Dr. Carey, and that he was competent at cross-examination, the



Court concludes that it is unlikely that the presence and participation of counsel on Dr. Yashon's behalf would have provided a procedure less likely to have resulted in erroneous findings of fact.

Although the courts have recognized the potential importance of counsel in alleviating the risk of erroneous factual determination in criminal trials, see Powell v. Alabama, 287 U.S. 45 (1932), and in welfare benefits pretermination hearings, see Goldberg v. Kelly, 397 U.S. 254 (1970), the hearing in this case was before physicians and involved charges of misconduct by another physician; under these circumstances, the Court will not equate Dr. Yashon's situation with that of a welfare recipient confronted with an administrative hearing or of a



defendant confronted with a criminal trial.

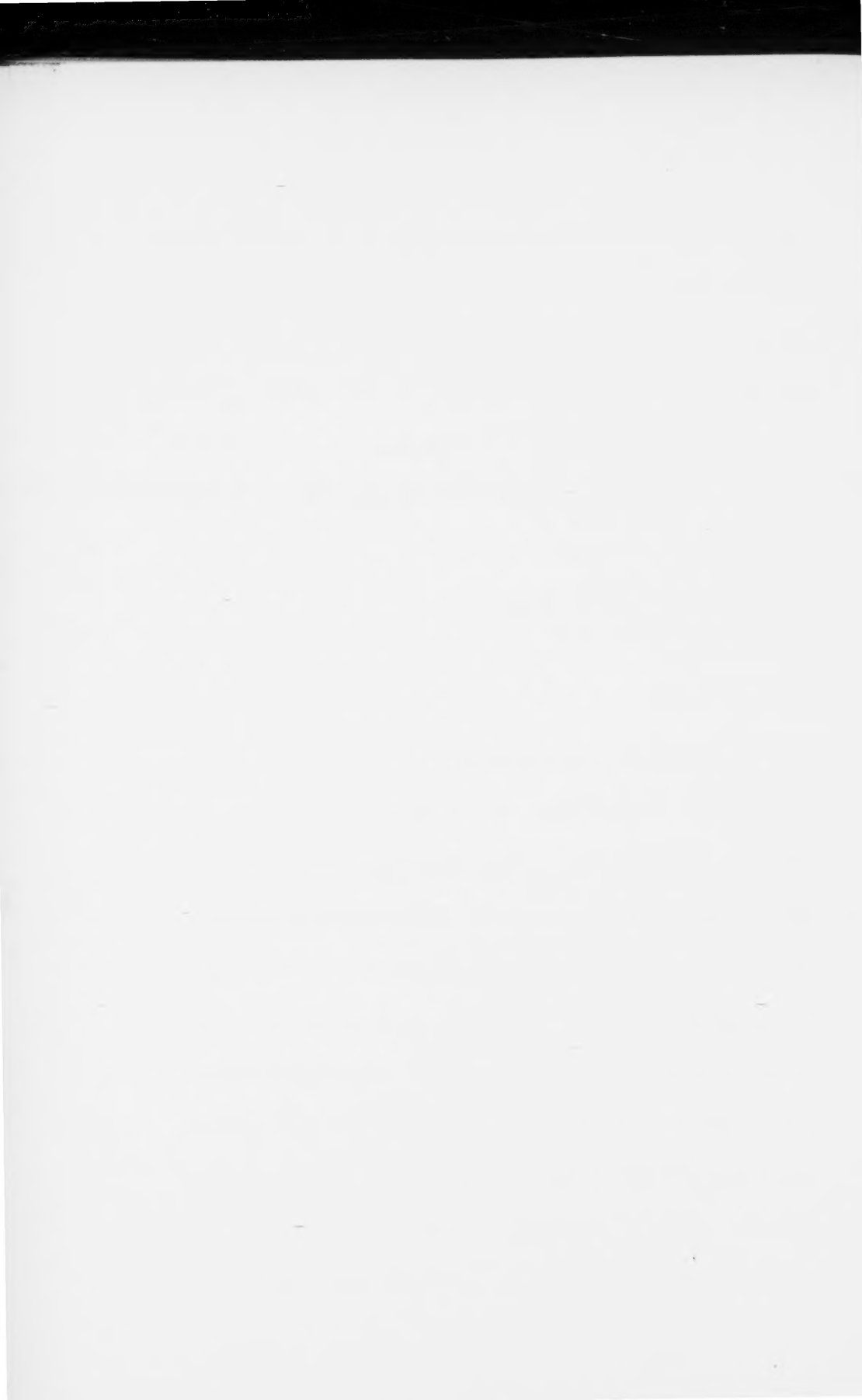
Dr. Yashon's two remaining procedural complaints, however, carry more weight. On the record before the Court, it is clear that Dr. Yashon did not, prior to the hearing of the Medical Staff Administrative Committee, have any notice that Dr. Carey planned to call witnesses; it is also clear that the Medical Staff Administrative Committee considered the evidence and rendered a decision without giving Dr. Yashon an opportunity to call his own witnesses.⁴⁴ Some courts have recognized that certain types of hearings involving a physician's appointment to a hospital's medical staff need not provide for the calling of witnesses. E.g., Woodbury v. McKinnon, supra; Christhilf v. The

Annapolis Emergency Hospital
Association, Inc., 496 F.2d at 179
n. 2. Other courts have simply held
that the procedures afforded the
physician by the hospital complied with
the due process clause; although the
hospitals accorded the physician the
right to call witnesses on his behalf,
the court's opinions did not hold that
this was constitutionally mandated.
E.g., Duffield v. Charleston Area
Medical Center, Inc., 503 F.2d at 519;
Hoberman v. Lock Haven Hospital, 377
F.Supp. 1178, 1188-89 (M.D. Pa. 1974).⁴⁵

Similarly, the law as to whether
the Medical Staff Administrative
Committee was required to render a
written decision specifying the reasons
for its decision is also less than
clear. The Supreme Court has, in a
variety of situations, required that

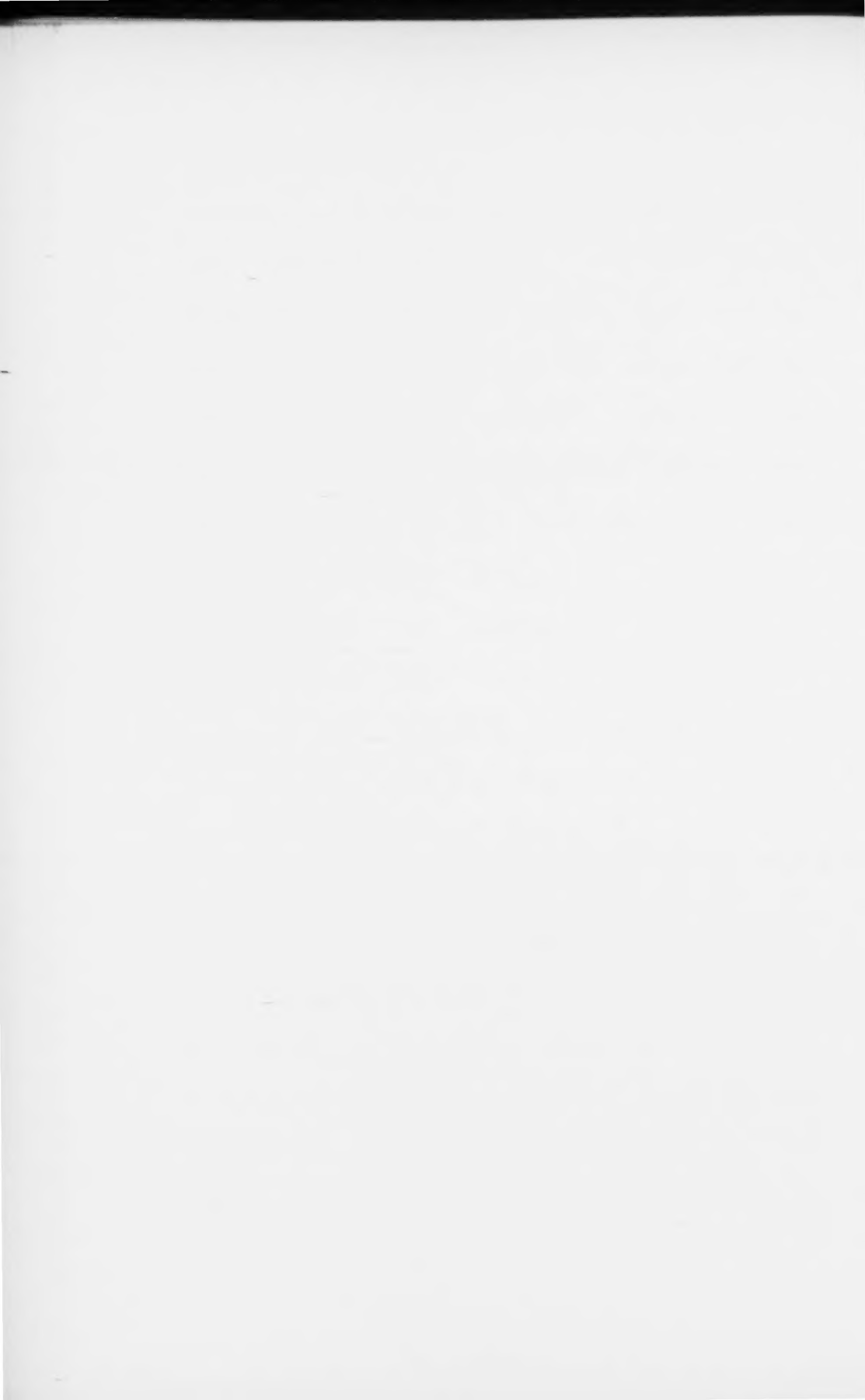


the fact finders render a written statement as to the evidence relied upon and the reasons for the decision. Goldberg v. Kelly, 397 U.S. 254, 271 (1970); Morrissey v. Brewer, 408 U.S. at 487, 489; Wolff v. McDonnell, 418 U.S. 539, 563 (1974). But see, Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1, 15-16 (1979); Connecticut Board of Pardons v. Dumschat, ____ U.S. ____, 49 U.S.L.W. 4711, 4713 and n. 6 (filed June 17, 1981). Cf. Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78, 85 (1978); Goss v. Lopez, 419 U.S. 565, 581 (1975). In this case, the minutes of the September 1, 1981 hearing reflect only the decision of the committee, that is, that Dr. Yashon should not be reappointed to the attending medical



staff; there is no indication as to which of Dr. Carey's charges was meritorious or of any of the evidence relied upon in finding certain charges meritorious. Though the Court, based upon its independent review of the record, finds that there was sufficient evidence to support certain of the charges, Dr. Yashon is correct in pointing out that the Court must speculate as to whether the Medical Staff Administrative Committee based its decision on the uncontested charges or on charges as to which there was conflicting evidence.

The Court is of the opinion that it would have been preferable that the defendants, having initiated a hearing on Dr. Carey's charges and having permitted Dr. Carey to call witnesses, had allowed Dr. Yashon the opportunity



to call witnesses in defense of the specific charges. Further, the Court's narrow task in assessing whether the decision of the Medical Staff Administrative Committee was reasonably related to the operation of the hospital, Sosa v. Board of Managers of the Val Verde Memorial Hospital, *supra*, would be considerably easier had the committee rendered a decision in which it, at the least, delineated which of the charges were meritorious.

As the Court has previously explained, Mathews v. Eldridge, *supra*, mandated that a number of factors must be balanced in determining what process was due Dr. Yashon. The Court further noted that The Ohio State University has a number of varied and important interests that must be weighed; apart from its interest in being able to deal

expeditiously with personnel matters, the university has very strong interests in ensuring that patients at University Hospitals are not treated by an incompetent physician and in fostering an environment in which physicians are able to work in a cooperative manner with other physicians and hospital personnel. These weighty interests strengthen the university's expectation that it be able to deal quickly with charges that a physician not be reappointed to the attending medical staff because of conduct that renders him professionally unfit; these interests, important as they are, are limited by the requirement that the procedures used in denying an application for reappointment not be fundamentally



unfair. See Stretten v. Wadsworth Veterans Hospital, supra.

In this case, despite the university's weighty interests, the weight of Dr. Yashon's important interest in being reappointed was not ignored. The record is clear that Dr. Yashon was given sufficient notice of the charges that would be considered by the Medical Staff Administrative Committee; that he was totally familiar with the incidents that served as the bases for Dr. Carey's charges; that he was given a full opportunity to respond to the charges; that he was given an opportunity to submit to the committee documentary evidence relevant to any of the charges; and that he was given, and exercised, the opportunity to confront and to cross-examine the witnesses against him. On this record, the Court



cannot conclude that the procedural irregularities raised by Dr. Yashon rendered the hearing and its accompanying procedural protections fundamentally unfair.

This conclusion is, the Court believes, supported by a number of other factors. The Medical Staff Administrative Committee, after considering the charges against Dr. Carey, decided that Dr. Yashon's application for reappointment to the medical staff for one year should be denied. The bylaws of the University Hospitals board make clear that the board has no responsibility over the academic programs at The Ohio State University, including those of the College of Medicine. Accordingly, the Medical Staff Administrative Committee properly limited itself to a

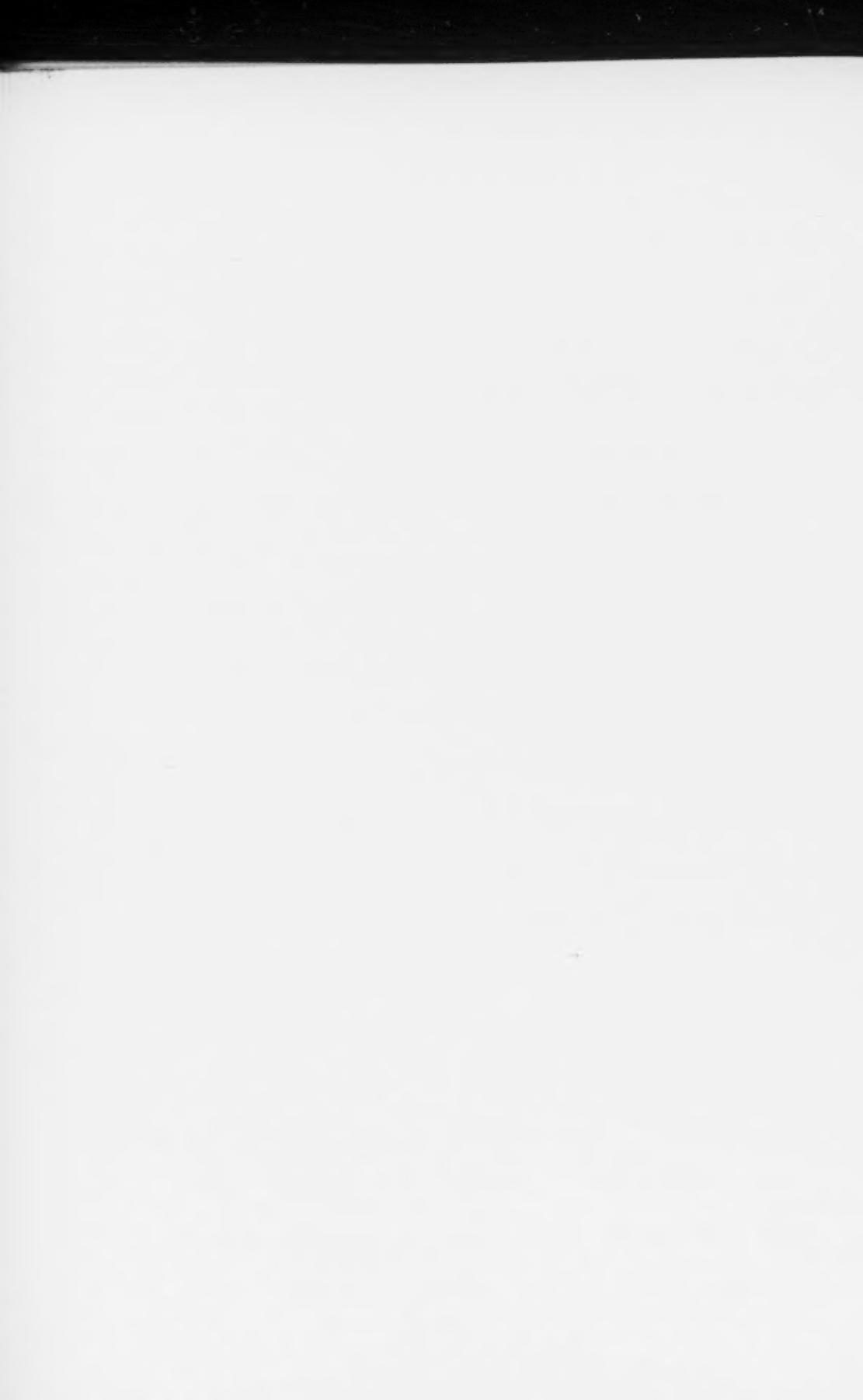


consideration of Dr. Yashon's application for reappointment; the committee did not, nor did it purport to, make any decision or recommendations as to Dr. Yashon's status as a tenured member of the faculty of the College of Medicine. Thus, the question of Dr. Yashon's tenure or the procedures that would be constitutionally required were the university to initiate a detenurization hearing is not before the Court.

Further, looking to the second factor in Mathews v. Eldridge, supra, the Court does not find that the additional procedural protections urged by Dr. Yashon would have, under the facts of this case, reduced the likelihood of possible errors in the findings of fact of the Medical Staff Administrative Committee. Although



given the opportunity to present documentary evidence, Dr. Yashon, while presenting some documents, did not present any that were relevant to Dr. Carey's specific charges. Further, in responding to the charges at the hearing, Dr. Yashon had a full opportunity to explain that there were other hospital personnel who could support his claim that the charges were meritless; yet, as to virtually all of the charges that he contested, Dr. Yashon merely claimed that the witnesses' versions of what had occurred were untrue or that the witnesses were unacquainted with all of the facts. Finally, neither at the hearing nor in his filings with the Court, has Dr. Yashon proffered the name of any witness he would have called had he been given the



opportunity. Under these circumstances, and in view of the Court's extensive review of the administrative record and its determination that there was sufficient evidence to support many of Dr. Carey's charges, a number of which were not even challenged, the Court cannot find that Dr. Yashon was unfairly prejudiced either by his inability to call witnesses or by the committee's failure to render a written decision as to which charges were meritorious.

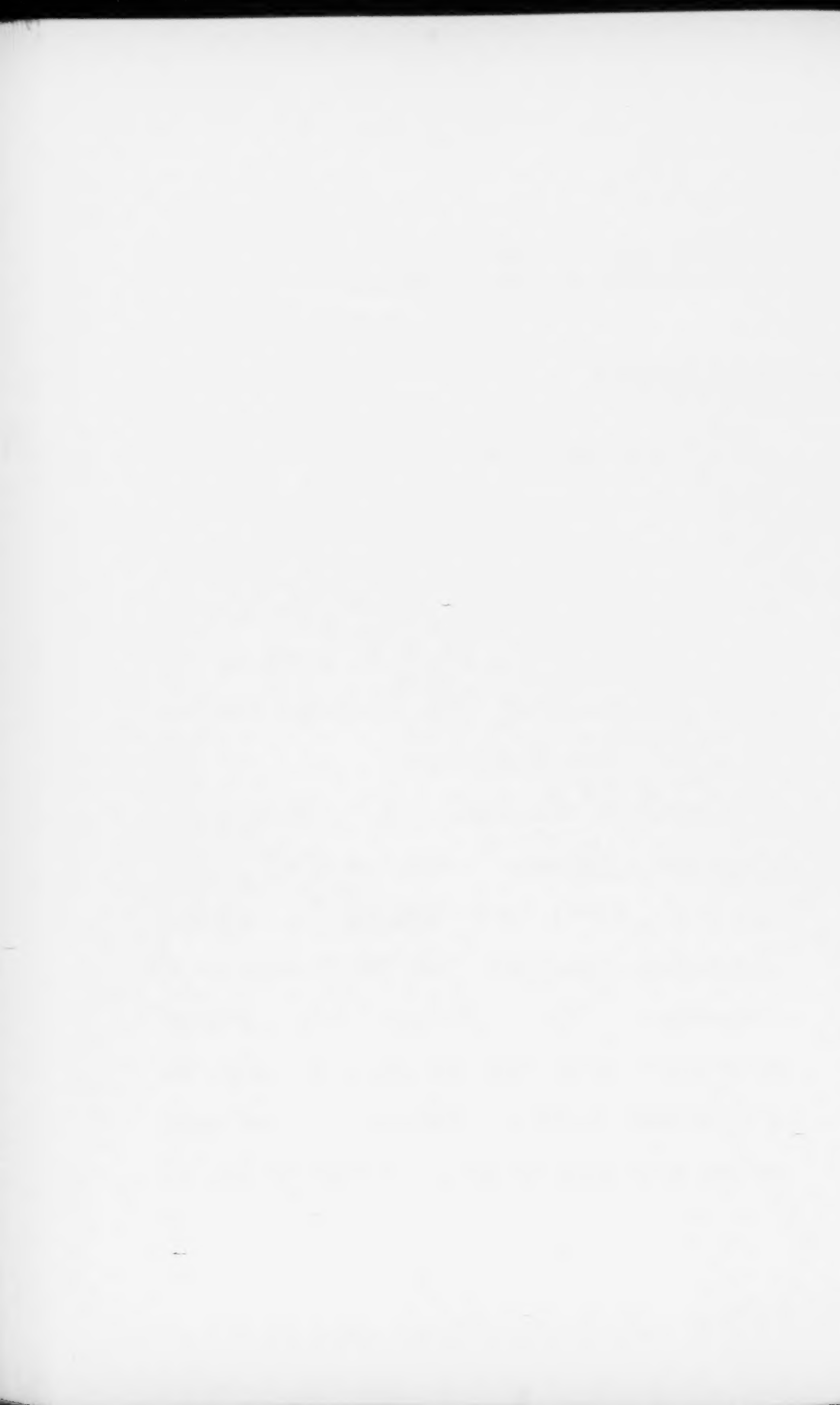
Accordingly, based on the foregoing analysis, the Court concludes that Dr. Yashon's contention that the hearing and decision of the Medical Staff Administrative Committee failed to comply with the dictates of substantive and procedural due process is without merit.



4. Failure to Comply with University
Hospital Board Bylaws

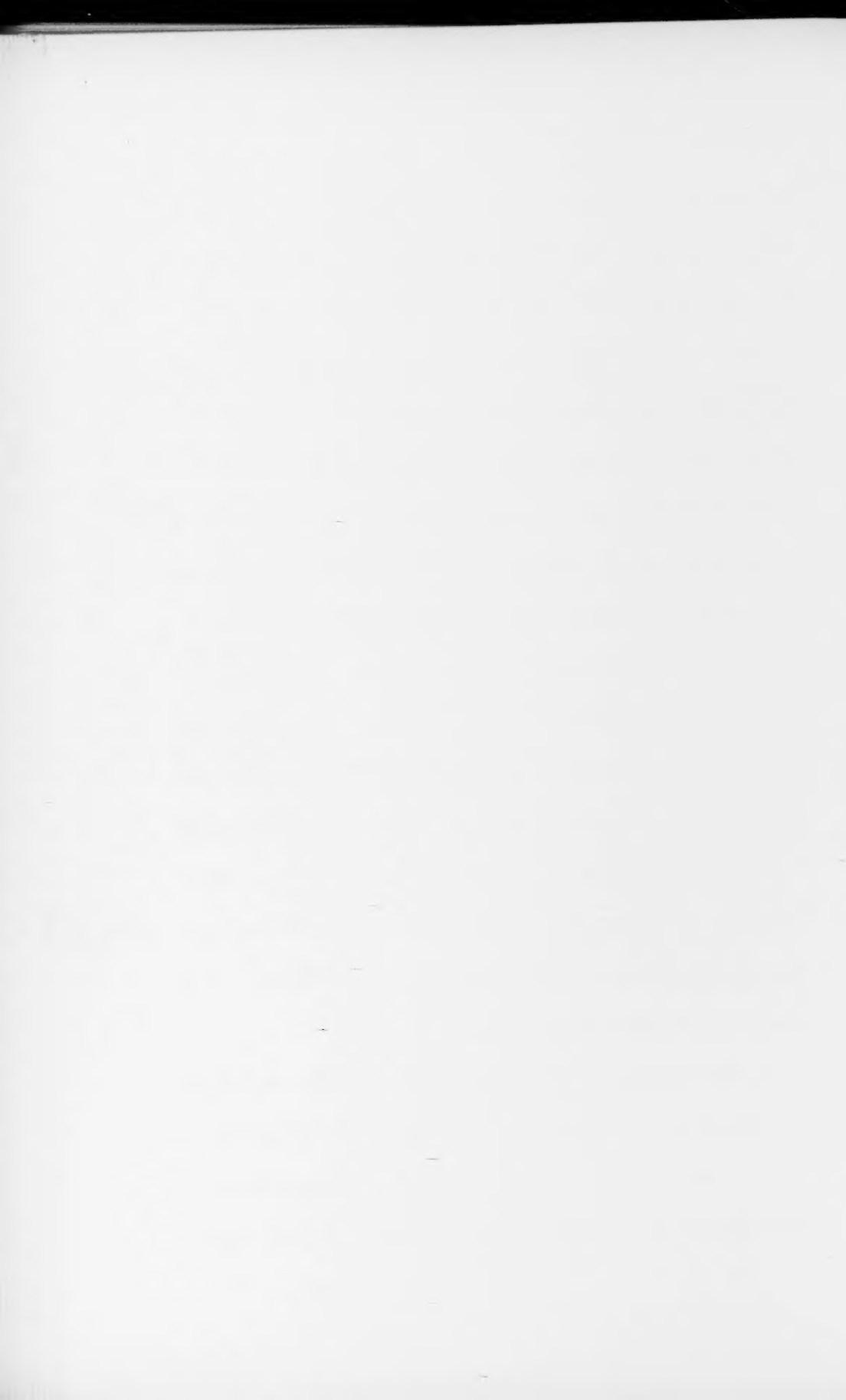
Dr. Yashon next argues that the Court should overrule defendants' motion because the defendants have not complied with the bylaws of the University Hospital Board; to grant the defendants' motion, Dr. Yashon contends, would be to grant finality to the decision of the Medical Staff Administrative Committee.

Citing Schulman v. Washington Hospital Center, 319 F.Supp. 252 (D. D.C. 1970) and Gotsis v. Lorain Community Hospital, 46 Ohio App.2d 8 (Cuyahoga Cty. 1974), Dr. Yashon maintains that the defendants "must at a minimum follow [their] own bylaws, rules and regulations concerning denial



of staff privileges." Plaintiff David Yashon, M.D.'s Memorandum in Opposition to Defendants' Motion to Vacate Consent Order and for Summary Judgment at 23. The University Hospitals Board bylaws provide that the Medical Staff Administrative Committee and the Joint Conference Committee shall make recommendations concerning applications for reappointment to the attending medical staff to the University Hospitals Board, but that the decision as to reappointment shall be made by the board itself. Accordingly, Dr. Yashon contends that the defendants' motion requests relief contrary to their own bylaws.

The complaint in this §1983 action alleged violations of rights guaranteed Dr. Yashon under the Fourteenth Amendment; the complaint alleged



jurisdiction under 28 U.S.C. §§1331 and 1343. The complaint did not, however, allege any pendent state law claims. The Court's duty, therefore, is to determine whether any failure of the defendants to comply with the bylaws of the University Hospitals Board violated Dr. Yashon's constitutional rights.⁴⁶

The Sixth Circuit Court of Appeals has ruled in a variety of contexts that not every disregard of its regulations by a state administrative agency amounts to a violation of federal constitutional rights:

Rather, it is only when the agency's disregard of its rules results in a procedure which in itself impinges upon due process rights that a federal court should intervene in the decisional processes of state institutions.

Bates v. Sponberg, 547 F.2d 325 (6th



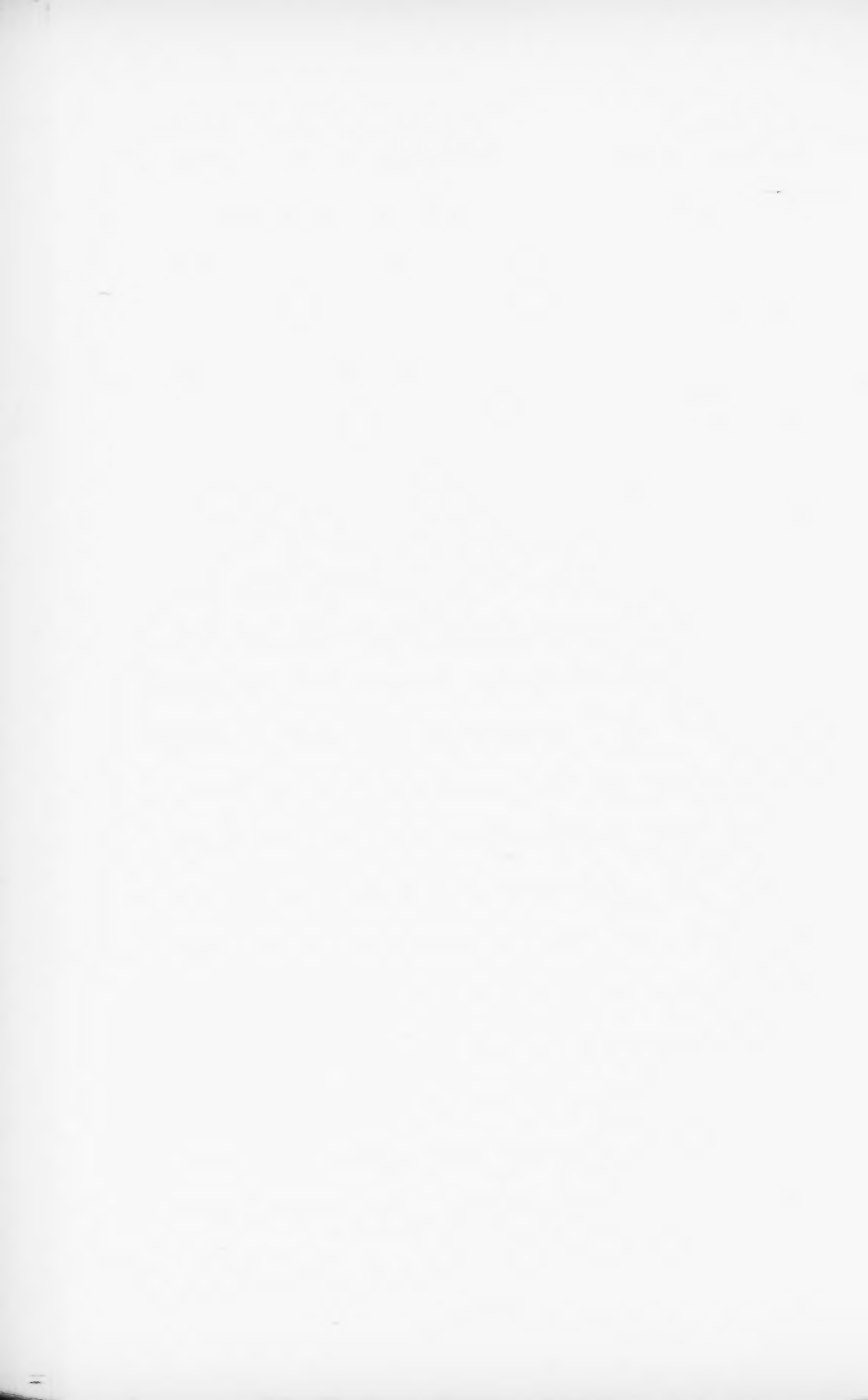
Cir. 1976). Accord, Bills v. Henderson, 631 F.2d 1287, 1298 (6th Cir. 1980). This conclusion is fully consistent with recent Supreme Court opinions. United States v. Caceres, supra; Board of Curators of the University of Missouri v. Horowitz, 435 U.S. at 92, n. 8. Cf. Cofone v. Manson, 594 F.2d 934 (2d Cir. 1979); Lombardo v. Meachum, supra.

Where, as here, Dr. Yashon has failed to establish that the defendants deprived him of a liberty or property interest in violation of the due process clause, the Court cannot conclude that the defendants' failure to comply with the reappointment procedures in the University Hospitals' bylaws deprived Dr. Yashon of any due process rights. Accordingly, the defendants' failure to comply with the



bylaws does not, standing alone, pose an impediment to granting defendants' motion to vacate the consent order and for summary judgment.

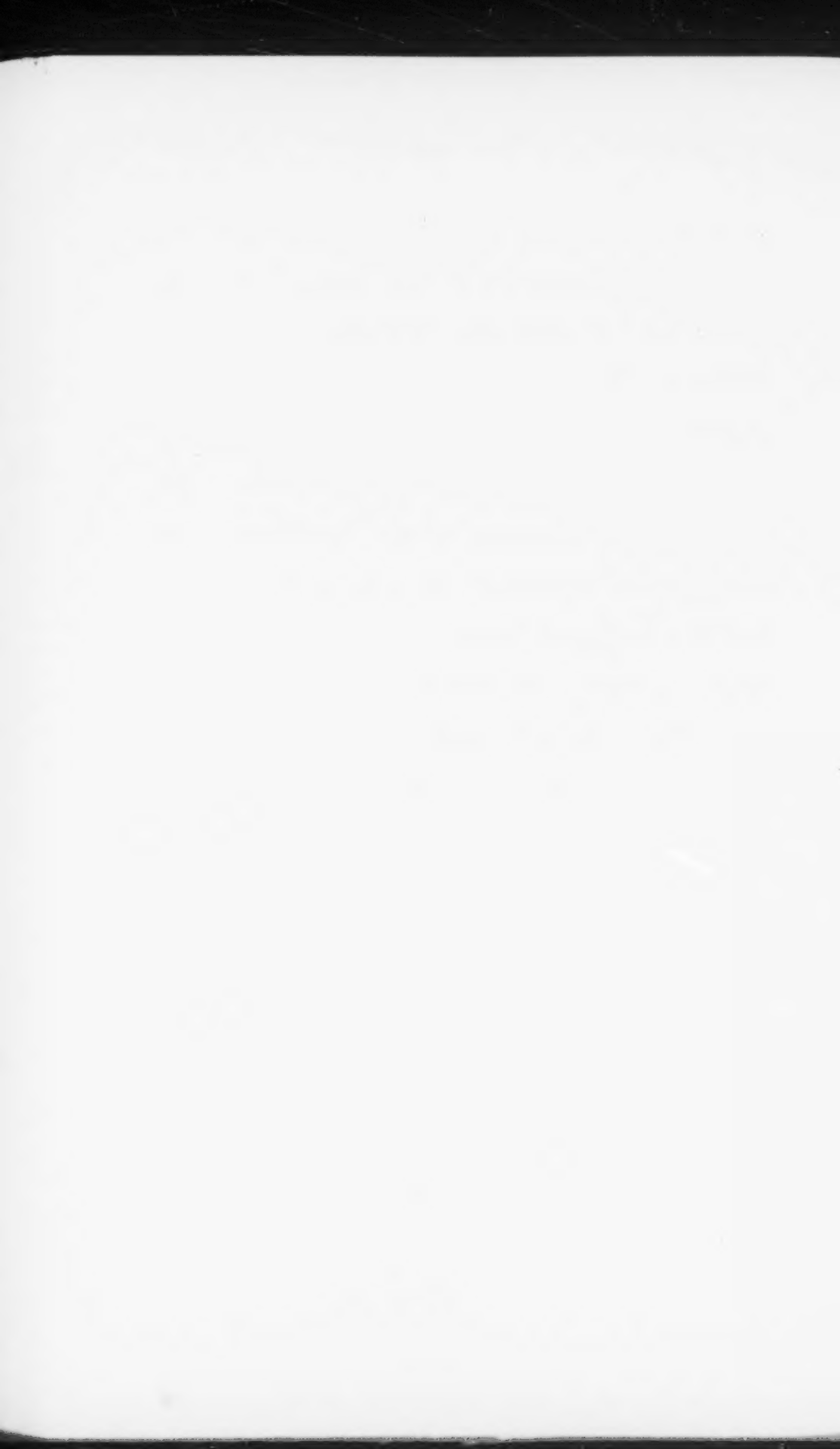
At a number of places in the complaint, see e.g., ¶¶46, 48, 50, Dr. Yashon raises a similar point; he urges that the defendants can only deny his application for reappointment to the attending medical staff pursuant to the procedures governing corrective action against a physician which are delineated in the constitution, bylaws, rules and regulations of the medical staff of University Hospitals⁴⁷ or pursuant to the procedures governing discipline of tenured faculty members which are delineated in the rules of the university faculty. The above analysis is equally applicable to these contentions as well. In that the



question of what due process is due is a federal question, the Court is not bound by procedures defined in state administrative rules when it considers whether the process afforded Dr. Yashon was constitutionally sufficient. In that the hearing and accompanying procedures utilized by defendants were fully constitutional, the Court finds that the defendants were not constitutionally required to comply with the disciplinary procedures in the rules of the university faculty or in the constitution, bylaws, rules and regulations of the medical staff.

5. The Appropriateness of Summary Judgment

Finally, Dr. Yashon argues that summary judgment is inappropriate



because there are disputes as to material facts. —

Fed. R. Civ. P. 56(c) provides, in relevant part, that

[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions — on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

In any civil litigation the standard for granting summary judgment under the above rule is strict. It is settled that

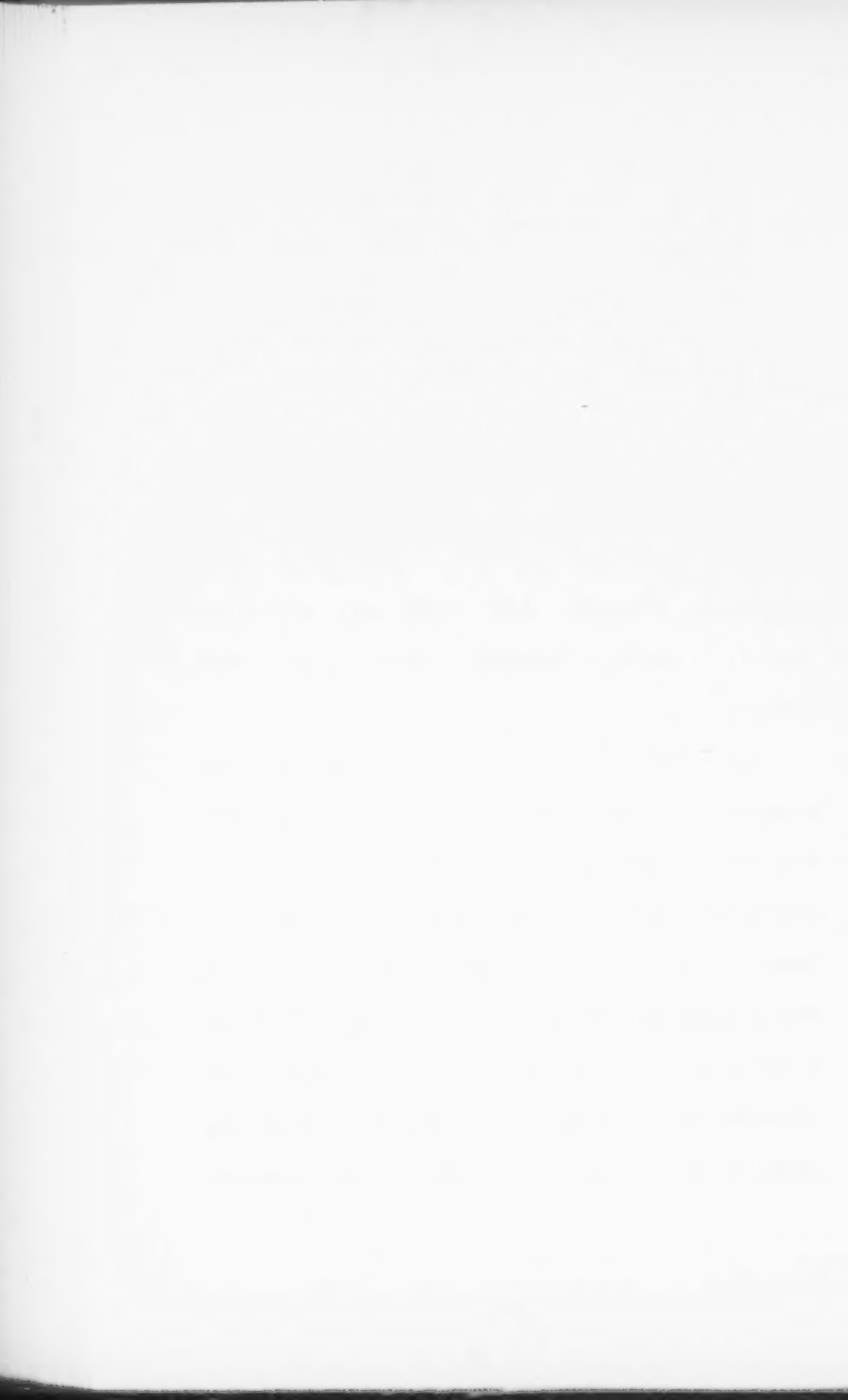
on a motion for summary judgment the movant has the burden of showing conclusively that there exists no genuine issue as to a material fact and the evidence together with all inferences to be drawn therefrom must be read in the light most favorable to the party opposing the motion. Adickes v. Kress & Co., 398



U.S. 144, 157, 158-59, 90
S.Ct. 1598, 26 L.Ed.2d 142
(1970); United States v.
Diebold, 369 U.S. 654, 655
(1962) (per curiam); United
States v. Articles of Device,
etc., 527 F.2d 1008, 1011
(6th Cir. 1976). . . .
[W]hile the movant's papers
are to be closely
scrutinized, those of the
opponent are to be viewed
indulgently. Bohn Aluminum &
Brass Corp. v. Storm King
Corp., 303 F.2d 425, 427 (6th
Cir. 1962).

Smith v. Hudson, 600 F.2d 60, 63 (6th
Cir.), cert. denied, 444 U.S. 986
(1979).

In this case, the only relief
sought by Dr. Yashon is injunctive
relief compelling defendants to
reinstate him to the attending medical
staff of University Hospitals and
restraining defendants from further
attempts to dismiss him from the
attending medical staff without
complying with the procedures



delineated in the rules of the university faculty and the constitution, bylaws, rules and regulations of the medical staff.

The Court has previously found that the defendants did not violate the due process clause in denying Dr. Yashon's application for reappointment to the attending medical staff; that is, the procedures employed by the Medical Staff Administrative Committee in considering his annual application for reappointment complied with the dictates of the Fourteenth Amendment. Further, the Court has ruled that, as a matter of federal constitutional law, the defendants were not required to follow the disciplinary procedures outlined in either the rules of the university faculty or in the constitution, bylaws, rules and



regulations of the medical staff. Under these circumstances, the Court finds that the disputed facts deferred to in the memorandum contra the defendants' motion are not material to a resolution of the only issue before the Court, namely, Dr. Yashon's reinstatement to the attending medical staff of University Hospitals. See, e.g., Woodbury v. McKinnon, supra; Klinge v. Lutheran Charities Association of St. Louis, supra; Kaplan v. Carney, 404 F.Supp. 161 (E.D. Mo. 1975).

D.

WHEREUPON, the Court determines that the defendants' motion to vacate the consent order and for summary



judgment is meritorious and it is GRANTED.

The Court ORDERS that the consent order of July 17, 1981, insofar as it provided that Dr. Yashon would be granted the same rights and privileges as a member of the medical staff of University Hospitals as he had had as of June 30, 1981, be and is hereby VACATED.

IT IS SO ORDERED.

/s/ Joseph P. Kinneary
United States District
Judge



FOOTNOTES

- 1 According to Dr. Yashon, the terms of the contract include the letter of offer, the annual notices of appointment, the relevant statutes of the State of Ohio, the bylaws of the Board of Trustees of The Ohio State University, the rules of the university faculty, the departmental and/or college statement of criteria and procedures for promotion and tenure, the faculty handbook, the operating manual, and any written understandings between Dr. Yashon and the university regarding his employment. Pursuant to this contract, Dr. Yashon had been awarded tenure. (Complaint, ¶¶6 - 7.)
- 2 The complaint also prays for injunctive relief.
- 3 The text of the May 10, 1979 agreement is reprinted in Appendix C at 10, appended as an exhibit to Defendants' Motion to Vacate the Consent Order and for Summary Judgment in David Yashon, M.D., et al v. William E. Hunt, M.D., et al, C-2-81-867.
- 4 The amended memorandum of Dr. Hunt detailed the circumstances under which resident assistance would be afforded Dr. Yashon.



- 5 The complaint also prays for injunctive relief.
- 6 The allegations relevant to this motion are fully detailed in the Court's discussion of a third suit filed by Dr. Yashon. Infra at Section A.3. of this opinion.
- 7 Attached to Dr. Carey's motion to dismiss the motion of Dr. Yashon for a preliminary injunction was the affidavit of Dr. Manuel Tzagournis, Dean of the College of Medicine. Dr. Tzagournis stated that the Medical Staff Administrative Committee of University Hospitals, at its June 10, 1981 meeting, and the Executive Committee of University Hospitals, at its June 17, 1981 meeting, had both declined to approve Dr. Yashon's application for reappointment. Dr. Tzagournis further stated that he twice advised Dr. Yashon of these decisions and of his opportunity for appeal and/or a hearing before the Medical Staff Administrative Committee, but that Dr. Yashon had not notified him of any wish to have a hearing convened. See Exhibits A-1 and A-2, attached to Dr. Tzagournis' affidavit.
- 8 The trustee defendants include: Chester Devenow; Leonard J. Immke; Warren J. Smith; Daniel M. Galbreath; John F. Havens; John D. Jacobs, D.D.S.; John W. Berry; and D. James Hilliker.

- 9 The University Hospital Board defendants include: Dean W. Jeffers; Charles Y. Lazarus; Dr. Lloyd M. Parks; John W. Wolfe; John Hodges; Frank Lomax; Dr. Frieda M. Shirk; The Honorable Robert M. Duncan; Arthur I. Vorys, Esq.; Josephine S. Frailer; Dr. Morris A. Rosenblum; Edmund C. Redman; and D. James Hilliker.
- 10 The Joint Conference Committee defendants include: Dean W. Jeffers; Dr. Frieda M. Shirk; Dr. Lloyd M. Parks; Arthur I. Vorys, Esq.; Daniel M. Galbreath; Donald A. Cramp; Manuel Tzagournis, M.D.; M. Jan Dickson; Earl N. Metz, M.D.; Ronald B. Berggren, M.D.; and Arthur D. James.
- 11 The Medical Staff Administrative Committee defendants include: Manuel Tzagournis, M.D.; Earl N. Metz, M.D.; Ronald B. Berggren, M.D.; John S. McDonald, M.D.; Tennyson Williams, M.D.; Calvin M. Kunin, M.D.; Frederick P. Zuspan, M.D.; William H. Havener, M.D.; William H. Saunders, M.D.; Donald A. Senhauser, M.D.; Grant Morrow III, M.D.; Martin D. Keller, M.D.; Ernest W. Johnson, M.D.; Ian W. Gregory, M.D.; Atis K. Freimanis, M.D.; William R. Wallace; Arthur D. James; Donald A. Cramp; and Dr. Carey.



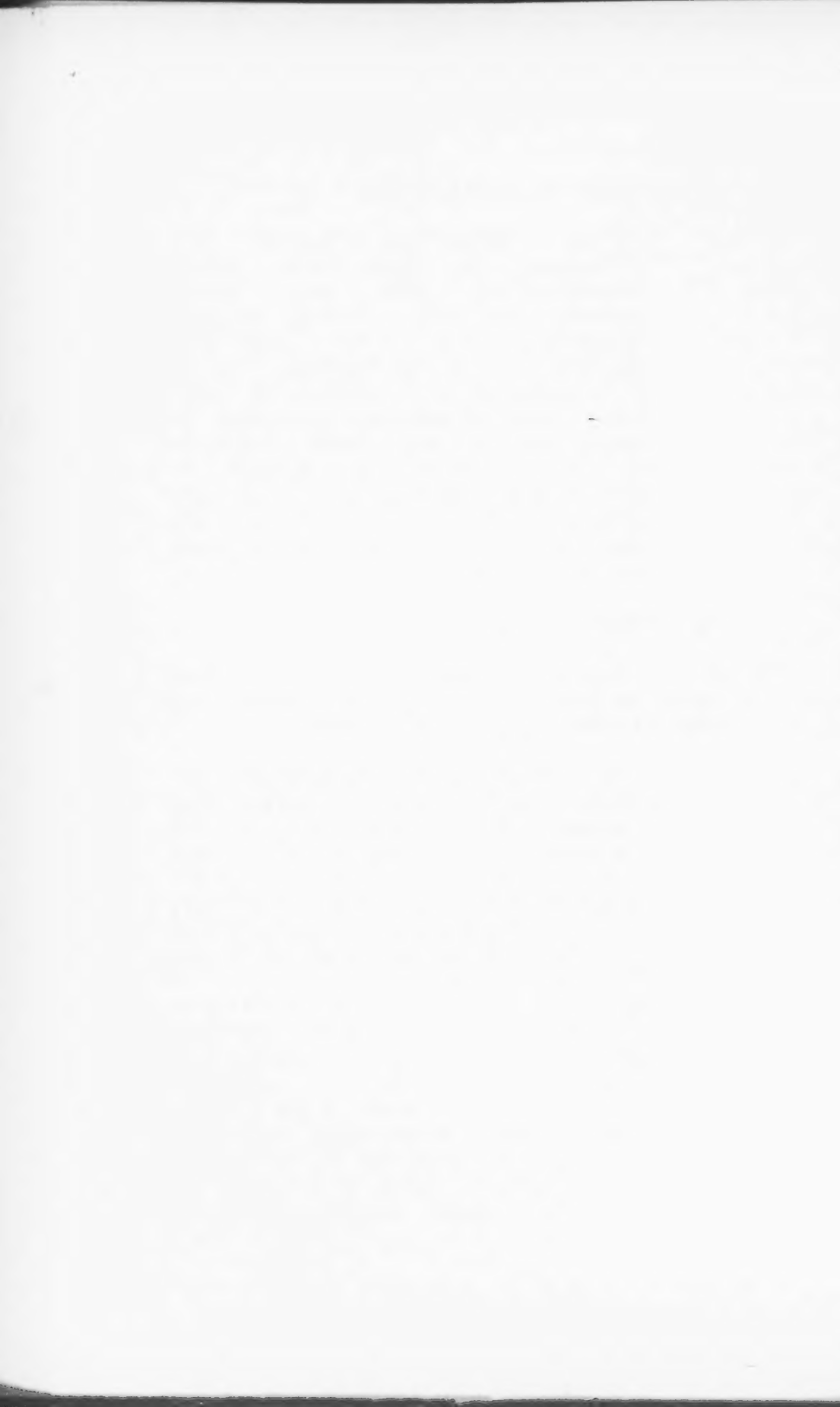
12 According to plaintiffs,

[t]he defendant Board [of Trustees of The Ohio State University] and all other defendants are joined herein pursuant to the specific objection of defendant Larry C. Carey [in C-2-81-411] that they are necessary parties to this action and that failure to join them as defendants would deprive the Court of the ability to award full and complete relief on the claims presented herein.

Complaint, ¶13.

13 Dr. Yashon contends that the application for reappointment to the attending medical staff

was routinely requested of each and every physician member of the faculty of the College of Medicine each year. As to those staff members who had been routinely and automatically reappointed to the Attending Medical Staff for a number of years, like plaintiffs, and particularly as to those staff members whose competence, fitness and character as medical practitioners had long since been established and approved by the University in granting them tenure, like plaintiff in Yashon, the submission of



these applications by plaintiffs was in 1981, as it had been in previous years, a formality incident to the orderly process of annual reappointment.

Complaint, ¶29.

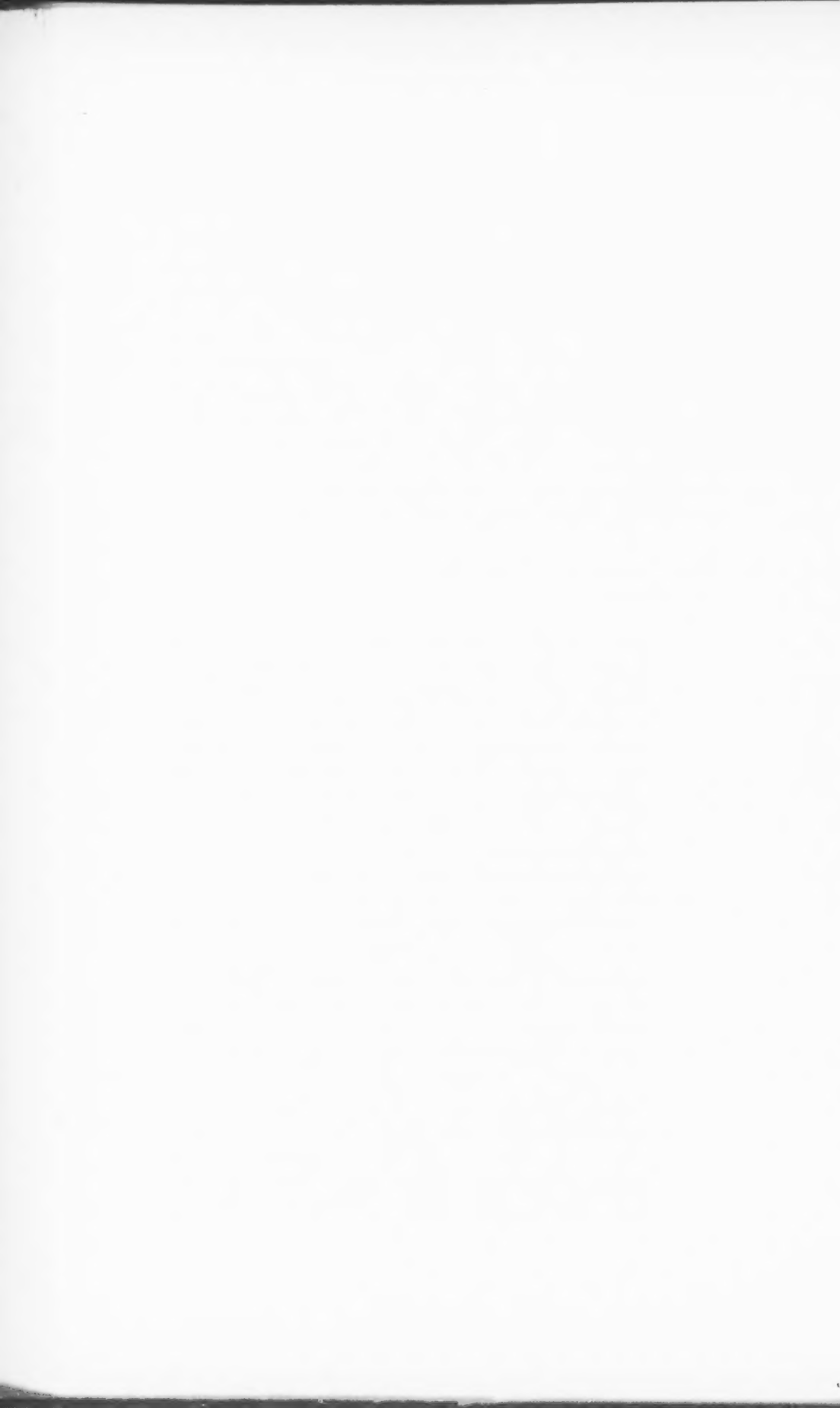
- 14 Dr. Tzagournis is the present Dean of the College of Medicine.
- 15 For a fuller discussion of these previous attempts, see Section B.3. of this opinion and order.
- 16 This claim is listed as the fifth claim in the verified complaint; the fourth claim deals with plaintiff Hawk's claim for relief and is not before the Court.
- 17 The allegedly unconstitutional features are delineated in paragraphs 55 - 62 of the verified complaint.
- 18 The plaintiffs have not, to date, filed a motion for a preliminary injunction; Dr. Yashon now urges that the motion for a temporary restraining order be treated as a motion for a preliminary injunction. - Plaintiff David Yashon, M.D.'s Memorandum in Opposition to Defendants' Motion to Vacate Consent Order and for Summary Judgment at 44.
- 19 Appended to defendants' motion to vacate the consent order and for



summary judgment were the following documents: Appendix A, a two volume transcript of the September 1, 1981 proceedings of the Medical Staff Administrative Committee [hereinafter App. A]; Appendix B, a September 3, 1981 letter of Dr. Whitcomb with attachments [hereinafter App. B], and Appendix C, a compilation of the documents submitted by Dr. Carey to the Medical Staff Administrative Committee at its September 1, 1981 meeting [hereinafter App. C].

- 20 The letter from Dr. Whitcomb stated in part:

At the last Medical Staff Administrative Committee meeting, September 1, 1981 was selected as the date to hear your request for reappointment to the Medical Staff. As Chairman of the committee, I have the responsibility for determining the format to be used during your hearing. Dr. Carey has written to Dr. Tzagournis stating his reasons for not recommending your reappointment to the Medical Staff (a copy of the letter is enclosed for your information). At the hearing, I will ask Dr. Carey to elaborate on the allegations contained in his letter. You in turn, will have the opportunity to respond fully to each of the issues raised



by Dr. Carey. Following the presentations by Dr. Carey and yourself, the Committee will meet to deliberate and vote on your request for reappointment.

- 21 At the hearing, Dr. Whitcomb amplified on the adequacy, from his perspective, of the notice afforded Dr. Yashon:

I would just simply say that by personal conversation with me, I informed him [Dr. Yashon] approximately five or six weeks ago that this hearing would take place and, because of the history and the accumulation of so much data, it was the opinion of the lawyers that consistent with other due process hearings of other medical staff, there did not need to be very specific information written out in detailed form in a letter to be provided to him. We were in no way attempting to do anything that would be unfair, and we specifically were not to create a situation in which, on the one hand, we present a great deal of information here and a great deal of information there. We were simply to hear why did Dr. Carey make his recommendation [.] That was all. The purpose of the meeting is what was Dr. Carey's reasoning.



App. A at 363-64.

- 22 Documentary evidence relevant to many of these charges was, however, available to members of the Medical Staff Administrative Committee. See Appendix C.
- 23 While the Court does not rule out the possibility that Dr. Yashon may have been able to find witnesses to support his denial of some of these charges, the Court notes that Dr. Yashon, either at the hearing or in his filings with the Court, has not proffered the name of any witness he would have called had he been afforded the opportunity. In addition, the record of the hearing demonstrates that most of the testimony was such that the committee members would have to decide whether Dr. Yashon's or the witness' recollection of what occurred was more trustworthy. This is especially true as to those charges as to which it appears there were no other available witnesses. See, e.g., App. A at 87-88, 161-67, 176-80, 185-91, 277-80 re. charge 1(d); App. A at 101-06, 111-14, 116-35, 147-48 re. charge 2(a); App. A at 237-41 re. charge 9; and App. A at 282-84, 333 re. charge 13.
- 24 Although Dr. Yashon was not told, prior to the hearing, the names of the persons Dr. Carey planned to call as witnesses nor the substance of the testimony they would present



in support of his reasons for declining to recommend Dr. Yashon's reappointment, the record in the three Yashon cases demonstrates that Dr. Yashon was aware of virtually all of the charges as to which testimony was proffered. Most, if not all, of the charges were referred to in the previous disciplinary actions that had been initiated against Dr. Yashon. See App. A at 121-23; App. C at 1, 2, 3(B), 3(C), 3(C)(1)(d), (j), (k), (q), (v), and (w), 3(C)(3), 3(C)(4), 3(C)(6), 4, 5, 6, 7, 8, and 9; Exhibits 23, 24, and 25, appended to Dr. Yashon's affidavit in support of his motion for a preliminary injunction in Yashon II.

- 25 Section 3335-5-03 of the Ohio Administrative Code provides that tenure may be lost by formal resignation, by retirement, or by reason of proved incompetence or grave misconduct in accordance with section 3335-5-04. According to section 3335-5-04(A)(7), "[c]omplaints alleging grave misconduct shall refer only to activities that, if proved, seriously impair a faculty member's effectiveness in meeting his defined teaching, service, and research obligations." Where, as here, the complaint against a tenured faculty member alleges grave misconduct, the dean of the college must dismiss the complaint if no reasonable and adequate grounds were found to support the



complaint; the dean's decision to dismiss the complaint is appealable to the provost. Section 3335-5-04(C)(2)(a).

- 26 It is not clear from the record whether this dismissal was appealed to the provost.
- 27 Dr. Keith was referring to the constitution, bylaws, rules and regulations of the medical staff of University Hospitals that were in effect prior to May 2, 1980. At the present time, no such governing rules are in effect. See Janata Affidavit at ¶9, App. A at 374-75.
- 28 The concern evidenced by Dr. Tzagournis as to what evidence was considered and what witnesses were heard by the grievance committee was reflected by various members of the Medical Staff Administrative Committee at the September 1, 1981 hearing. App. A at 154-57, 228-29, 272. Of those who testified at the September 1, 1981 hearing, it is clear that at least Drs. McGaharan, Hill, Miller and Goodman were not interviewed by the grievance committee. App. A at 205, 228, 272, 286. It is also clear that two other residents who were critical of Dr. Yashon, Drs. Steven Natelson and Richard Dewey, were not interviewed by the grievance committee. App. A at 154-57.
- 29 For reasons not apparent from the record, the hearing date of



November 2, 1980, see App. C at 9, was changed to November 23, 1980. The Court notes that Appendix C, which was provided to the Medical Staff Administrative Committee, had been originally compiled for the November 23, 1980 meeting of the Executive Committee.

- 30 The events relating to the Brumfield incident formed the basis for charge 1(d) in Dr. Carey's August 14, 1981 letter to Dr. Tzagournis.
- 31 Neither of the parties has provided the Court with a copy of the written report of the Executive Committee.
- 32 The other charge considered by this committee involved a matter as to which no testimonial evidence was presented at the September 1, 1981 hearing of the Medical Staff Administrative Committee.
- 33 The precise function of the Board of Trustees in terms of appointments to the medical staff is unclear. See Section 3335-101-05 of the Ohio Administrative Code: the University Hospitals Board may appoint physicians and dentists to the medical staff "subject to the ratification of the Ohio state university board of trustees."
- 34 Section 3335-97-03(A)(3) of the Ohio Administrative Code provides



that the Joint Conference Committee "shall make recommendations to the [University Hospitals] board on all applications for appointment or reappointment to the medical staff of the hospitals," Section 3335-101-06(A) provides that the Medical Staff Administrative Committee "shall . . . make recommendations regarding medical staff status and privileges to the [University Hospitals] board."

35 Section 3335-101-04 provides:

The medical staff organization shall recommend to the board medical staff bylaws, rules, and regulations that set forth the medical staff organization and the governance process for maintaining such bylaws, rules, and regulations to accomplish the purposes set forth in rule 3335-101-03 of the Administrative Code. When such bylaws, rules, and regulations are adopted by the board and the Ohio state university board of trustees, they shall become effective and become part of the bylaws, rules, and regulations of the hospitals. The medical staff organization shall also be responsible for reviewing these bylaws, rules, and regulations periodically and recommending appropriate revisions to the board.



Pursuant to section 3335-101-05, the bylaws would have to include qualifications for membership on the attending medical staff as well as procedures governing the reappointment of physicians to the medical staff.

- 36 Prior to May 2, 1980, appointments to the attending medical staff and the discipline of medical staff members were governed by articles IV, V, and VI of the constitution and bylaws of the medical staff of The Ohio State University Hospitals. See Janata Affidavit ¶9 and attachments. Article IV had likewise provided that appointments to the medical staff would be for one year. In addition, Article IV had required that an application for appointment be submitted to the director of University Hospitals, who would then transmit the application to the chief of the appropriate clinical division. The final decision was to be made by the dean of the College of Medicine. Under the bylaws of the University Hospitals Board, the board itself makes the decisions on applications for appointments to the medical staff; the present bylaws do not direct to whom an application for appointment or reappointment is to be forwarded, though this matter will undoubtedly be resolved by the yet to be approved medical staff bylaws.

- 37 The Court is of the opinion that



this distinction between revocation of privileges of a member of the attending medical staff and annual reappointment to the attending medical staff is not without meaning. While any particular incident or incidents of misconduct may not be considered of such magnitude as to justify the removal of a physician during the course of his annual appointment, such incident or incidents, when considered with other allegations of misconduct, may justify a hospital's decision to decline to reappoint a physician when his one year appointment to the attending medical staff expires. Accordingly, the Court agrees with the defendants that the principles of res judicata and collateral estoppel did not bar the members of the Medical Staff Administrative Committee from considering, in the context of reviewing Dr. Yashon's annual application for reappointment, the charges considered at prior disciplinary hearings; as the defendants point out, "it is imperative that the Administrative Committee, because of its responsibilities to the hospital and to the public, consider all of the incidents touching on Dr. Yashon's qualifications to serve on the staff of a teaching institution." Defendants' Reply Memorandum in Support of Motion to Vacate Consent Order and for Summary Judgment at 9.



- 38 In his October 22, 1980 letter to Dr. Yashon, Dr. Tzagournis made clear that the Executive Committee could confirm, modify, or reject his decision to issue a reprimand; Dr. Tzagournis also listed fifteen specific charges that would be considered by the Executive Committee. Dr. Tzagournis' view that the Executive Committee was empowered to conduct a de novo review of the charges against Dr. Yashon and to recommend confirmation, modification, or rejection of the decision to issue a reprimand was in accord with the then existing constitution and bylaws of the medical staff of University Hospitals. See Article VI §§3(B), 4(I), attached as an exhibit to the Janata Affidavit. As defendants correctly point out, the Executive Committee, had it heard Dr. Yashon's appeal, may have chosen to recommend Dr. Yashon's dismissal from the attending medical staff in lieu of a reprimand.
- 39 Implicit in Dr. Yashon's argument is the admission that he would not have objected to Dr. Carey's testifying as to the matters actually testified to by the thirteen witnesses. The Court fails to see how Dr. Yashon could be prejudiced by being confronted by the testimony of the witnesses themselves as opposed to the hearsay testimony that Dr. Carey would have presented. The separate



question of whether Dr. Yashon was prejudiced by his inability to prepare for adequate cross-examination or to present rebuttal testimony will be examined as part of the due process analysis.

- 40 The Court believes that the standard promulgated by the Fifth Circuit in Sosa, supra, and cited approvingly in Woodbury, supra, and Laje, supra, is appropriate when a physician has a liberty or property interest in being a member of the medical staff of a particular hospital. To the extent that the opinions in Sosa and Laje hold that a physician must be accorded the substantive and procedural protections of the due process clause despite the fact that the physician does not possess a liberty or property interest in being a member of a hospital's medical staff and absent any allegation that membership on the medical staff was denied for a constitutionally impermissible reason, the Court declines to follow them. As the Seventh Circuit ruled in Jeffries v. Turkey Run Consolidated School District, 492 F.2d 1, 4 (7th Cir. 1974) [footnote omitted],

the right to procedural due process is applicable only to state action which impairs a person's interest in either liberty or property. Certainly the constitutional

right to "substantive" due process is no greater than the right to procedural due process. Accordingly, the absence of any claim by the plaintiff that an interest in liberty or property has been impaired is a fatal defect in her substantive due process argument.

Accord, Sullivan v. Brown, 544 F.2d 279, 282 (6th Cir. 1976); Parham v. Hardaway, 555 F.2d 139 (6th Cir. 1977); Eichman v. Indiana State University Board of Trustees, 597 F.2d 1104, 1109 (7th Cir. 1979); Webster v. Redmond, 599 F.2d 793, 799-802 (7th Cir. 1979).

- 41 The Court does not believe that a teaching hospital such as University Hospitals is restricted to an examination of a physician's professional competence as a surgeon in deciding whether to grant medical staff privileges. Cf. Pollock v. Methodist Hospital, 392 F.Supp. 393, 397 (E.D. La. 1975).
- 42 Dr. Yashon cites only one specific instance of prejudice that resulted from his inability to conduct pre-hearing discovery. Plaintiff David Yashon, M.D.'s Memorandum in Opposition to Defendants' Motion to Vacate Consent Order and for Summary Judgment at 32. The Court notes, however, that none of the charges made by Dr. Carey involved



Dr. Yashon's professional competence in performing cerebral aneurysm surgery; the charge, rather, was that Dr. Yashon had orally falsified to Dr. Carey the results of his surgery.

- 43 The Court notes, however, that both the New Jersey and Hawaii decisions did not rest on federal constitutional law; rather, both cases involved the procedures mandated under state law as to appointments to the medical staffs of non-public hospitals.
- 44 Dr. Yashon's claim that he was denied the right to introduce documentary evidence is without merit except insofar as he is referring only to rebuttal documents. Dr. Whitcomb's letter to Dr. Yashon, ante at n. 20, made clear that Dr. Yashon would be given the opportunity to respond fully to each of the charges raised by Dr. Carey; this would include the right to present documentary evidence, a right that was utilized by Dr. Yashon as to a number of issues. See App. B for the compilation of documents submitted by Dr. Yashon at the hearing.
- 45 In fact, none of the cases cited by Dr. Yashon expressly holds that a physician is entitled, pursuant to the due process clause, to call witnesses on his own behalf in a proceeding held to consider his appointment or reappointment to the



medical staff, or his removal from the medical staff. Thus, a number of courts have held that the physician has the right to cross-examine adverse witnesses, to challenge the charges of misconduct, and to present evidence in his own behalf; they do not, however, amplify as to whether the right to present evidence includes the right to call witnesses. E.g., Poe v. Charlotte Memorial Hospital, 374 F.Supp. 1302, 1310-11 (W.D. N.Car. 1974); Christhilf v. The Annapolis Emergency Hospital Association, Inc., 496 F.2d at 178-79. Cf. Klinge v. Lutheran Charities Association of St. Louis, supra. Other courts have approved as constitutional proceedings in which no witnesses were called. E.g., Schlein v. The Milford Hospital, 423 F.Supp. 541, 543 (D. Conn. 1976); Stretten v. Wadsworth Veterans Hospital, 537 F.2d at 363; Woodbury v. McKinnon, 447 F.2d at 844. The other cases cited by Dr. Yashon are not on point; two of the cases involve procedural protections afforded a physician under state law, while the third, Morrissey v. Brewer, 408 U.S. 471, 488-89 (1972), involved the procedural rights that must be afforded a parolee before his parole could be revoked.

- 46 Both of the cases cited by Dr. Yashon, Schulman v. Washington Hospital Center, supra, and Gotsis v. Lorain Community Hospital,

supra, involved the procedures employed by private hospitals in appointing physicians to their medical staffs; accordingly, these cases did not involve constitutional claims. In that there are no pendent state law claims before the Court, the Court will not render any opinion as to whether University Hospitals is bound under state law to comply with its bylaws and, if so, what is the appropriate relief for a physician whose application for reappointment is denied pursuant to procedures that fail to comply with the hospital's bylaws. See Lombardo v. Meachum, 548 F.2d 13, 16-17 (1st. Cir. 1977).

- 47 As previously explained, ante at n. 36 and accompanying text, the constitution, bylaws, rules and regulations are no longer in effect; to date, a new constitution and bylaws for the medical staff has not been approved. Accord, App. A at 374-75.



UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 85-4027

DAVID YASHON, M.D., et al.,
Plaintiffs-Appellants,
v.
WILLIAM E. HUNT, M.D., et al.,
Defendants-Appellees.

Before: KENNEDY and MILBURN, Circuit
Judges; and CONTIE, Senior
Circuit Judge.

J U D G M E N T

(Filed August 3, 1987)

ON APPEAL from the United States
District Court for the Southern
District of Ohio.

THIS CAUSE came on to be heard on
the record from the said district court
and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now
here ordered and adjudged by this court
that the judgment of the said district
court in this case be and the same is
hereby affirmed.



IT IS FURTHER ORDERED that
Defendants-Appellees recover from
Plaintiffs-Appellants the costs on
appeal, as itemized below, and that
execution therefor issue out of said
district court, if necessary.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

/s/ John P. Hehman
Clerk



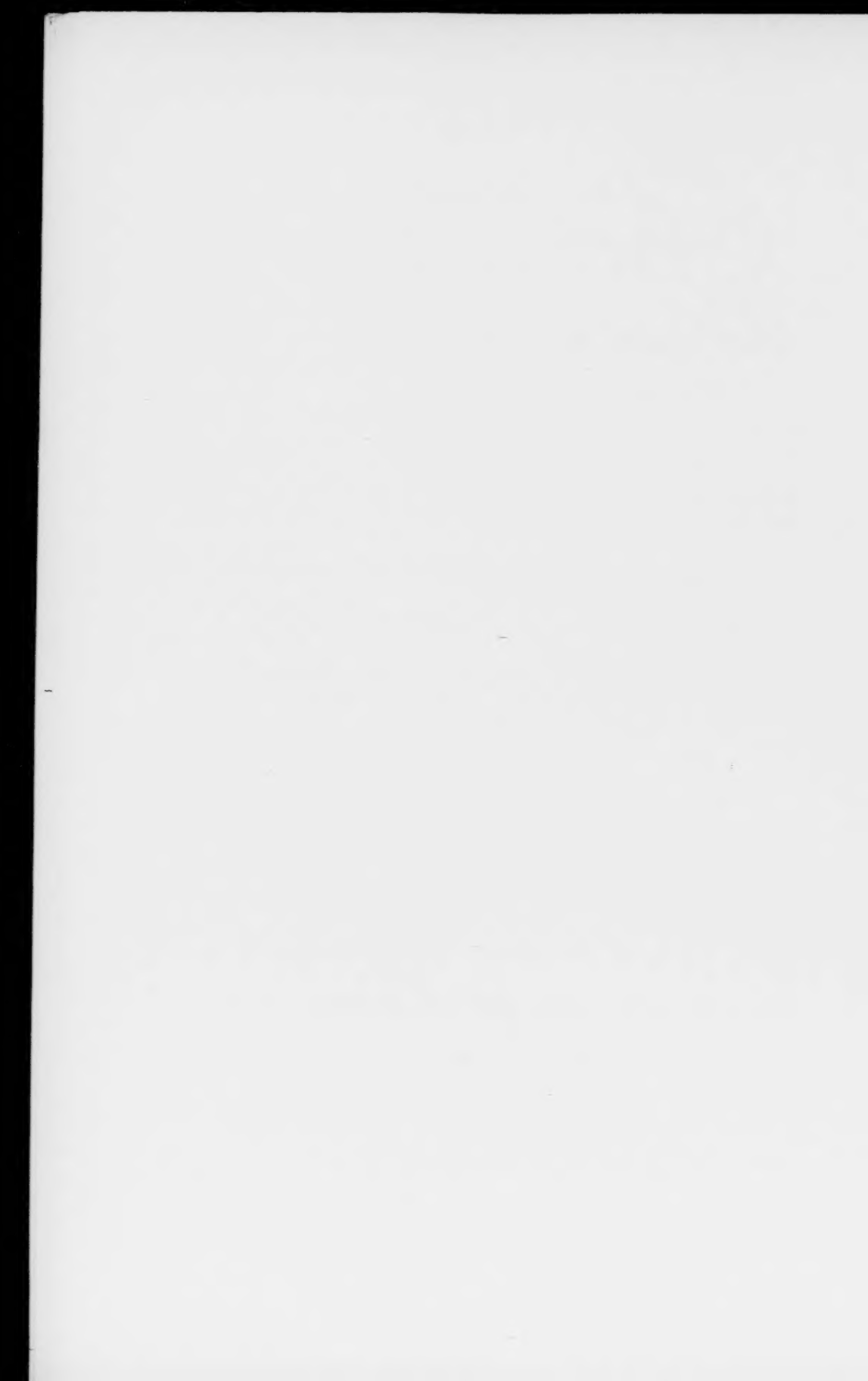
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DAVID YASHON, M.D., ET AL.,)	
)	
Plaintiffs-Appellants,)	
)	
v.)	O R D E R
)	
WILLIAM E. HUNT, M.D.,)	
ET AL.,)	
)	
Defendants-Appellees)	

(Filed September 22, 1987)

Before: KENNEDY and MILBURN, Circuit
Judges and CONTIE, Senior
Circuit Judge.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the



petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

/s/ John Hehman
Clerk